Supreme Court, U. S.
FILED
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-63

JAMES E. HOLSHOUSER, Governor of the State of North Carolina, ET AL.
Appellants

vs.

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency

---

On Appeal from the United States District Court for the Eastern District of North Carolina

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Jurisdictional Statement Filed July 16, 1976
Probable Jurisdiction Postponed October 4, 1976

Commercial Printing Co., Raleigh, N. C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

THE WASHINGTON STATE APPLE ADVERTISING COMMISSION, A Washington State Agency Plaintiff vs. JAMES E. HOLSHOUSER, Governor of the State of North Carolina; RUFUS L. EDMISTEN, Attorney General of the State of North Carolina; JAMES A. GRAHAM, Commissioner of Agriculture of the State of North Carolina who are sued in their official capacity only Defendants	Civil Actior File No. 75-0300-Civ-5

DOCKET ENTRIES

Date	Proceedings
1975	
Sept. 19	Fil. & ent. Complaint — Plff. prays: Three-judge court be convened; That court that [sic] N. C. G.S. 106-189.1 violates Art. I, Sec. 8 of the U. S. Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the U. S.; that said statute violates the equal protection clause of the 14th Amend. by providing that apples be treated differently from other fresh fruit, etc., shipped in open containers; that said statute violates due process clause of 14th Amend.; that said statute infringes upon the right of free speech, and the right of

buyers to know and use said grade, all as guaranteed by the 1st. Amend. of U. S. Constitution as incorporated into the due process clause of the 14th Amend. of U. S. Constitution.; that this cause be advanced for early hearing & court issue prelim. inj. after notice restraining & enjoining defts. from enforcing N.C. G.S. §106-189.1, to the extent the same applies to sale, offer for sale or shipment of Wash. State apples in closed containers, and that this prelim. inj. be effective against any persons, pending the hearing and determination of the cause; that upon hearing, the inj. be made permanent. Foregoing prayer to apply to First & Second Cause of Action in Complaint. Plff. further prays that its costs and other relief be granted as court deems just.

Oct. 2	Fil. and ent. U.S. Marshal's Returns on Summons &.Complaint . . .
Oct. 7	Fil. and ent. Motion to Dismiss by defts. w/CS.
Oct. 14	Fil. and ent. Order Certifying Pendency of Action Requiring Three-Judge Court . . .
Oct. 20	Fil. and ent. Designation of Three-Judge Court . . .
Nov. 26	Notice of Hearing . . .
Dec. 5	Fil. and ent. Stipulation to Amend Complaint and First Amended Complaint . . . . .
Dec. 31	Fil. and ent. Memorandum Order that defts'. motion to dismiss is denied . . .

1976

Jan. 9	Notice of Pre-Trial Conference . . .
Jan. 13	Fil. and ent. Answer of defts . . . . .
Jan. 23	Fil. and ent. Final Pre-Trial Order . . .
Jan. 26	Fil. and ent. affidavits of C. W. Schulke, Gillis Coleman, Thomas R. Morris, Donald Ford, Avery Womble, Joe McGee, J. L. Morgan, John C. Taylor, Arlis E. Vernon, and W. L. Kyle . . . . .
Jan. 29	Fil. and ent. Affidavits of Herbert L. Frank, Dick Shumway, Frank Coleman, Richard R. Larsen, Clayton Udell, Robert Scea and Bill Hartmann . . .
Feb. 2	Fil. and ent. Supplemental Affidavit of C. W. Schulke . . .
	Fil. and ent. Affidavit of Harold Cozart . . .
	Fil. and ent. Affidavits of Richard N. Barber, Charles Murray, Charles Elks, Curtis Tarleton, and Lynwood Davenport . . .
Feb. 3	Fil. and ent. Affidavits of Everett Lutz and Boyce Enloe . . .
Feb. 4	Fil. and ent. Affidavit of Perry Lowe, Jr. . . .
Feb. 5	Fil. and ent. Affidavits of Joseph T. Brownlow and Lew Sterling . . .
	Fil. and ent. Supplemental Affidavit of C. W. Schulke Controverting Affidavits of Defendants . . .

Feb. 6	Three-Judge Court Hearing in Raleigh — 1 hr. 10 min. (Craven, Larkins & Dupree)
Mar. 1	Fil. and ent. Memorandum Decision . . .
	Fil. and ent. Judgment declaring N. C. Gen. Stat. §106-189.1 unconstitutional and enjoining the enforcement thereof against display of Washington State Apple grades on closed containers . . .
May 20	Fil. and ent. Notice of Appeal to the Supreme Court of the United States by defts. w/CS
Sept. 16	Original case file mailed to Supreme Court of U. S., pursuant to phone request today.

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

COMPLAINT TO DECLARE SECTION 189.1 OF CHAPTER 106 OF THE NORTH CAROLINA GENERAL STATUTES UNCONSTITUTIONAL AND ENJOIN ENFORCEMENT THEREOF.

(Filed 19 September 1975)

Plaintiff complaining alleges:

FIRST CAUSE OF ACTION

1. This is an action seeking an injunction restraining the enforcement of a statute of the state of North Carolina upon the ground of unconstitutionality of such statute. This action presents a question of law under the Constitution and laws of the United States as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Plaintiff seeks a declaratory judgment that Section 189.1 of Chapter 106 of the North Carolina General Statutes (G. S. §106-189.1), to the extent the same applies to the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers, constitutes an unreasonable burden and restriction upon interstate commerce and is in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8; that it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and that it violates the plaintiff's right of free speech protected by the First Amendment to the Constitution of the United States. Plaintiff asks that an injunction be

granted to it permanently restraining the enforcement of said statute by the defendants against the sale, offer of sale or shipment into North Carolina of Washington States apples in closed containers.

3. This court has original jurisdiction of this action under 28 U.S.C. §1331, 28 U.S.C. §2201, and 28 U.S.C. §2202. This action arises under the Constitution of the United States, specifically Article I, Section 8, and the First and Fourteenth Amendments. Plaintiff seeks the convening of a three-judge court pursuant to 28 U.S.C. §2281 and §2284 because an injunction is sought restraining, on Federal Constitution grounds, the enforcement or execution of the North Carolina statute mentioned herein.

4. The plaintiff, Washington State Apple Advertising Commission, herein also referred to as the "Washington Apple Commission", is an agency of the state of Washington, and created by an act of the Washington Legislature as set forth in Revised Code of Washington 15.24. The plaintiff is empowered to sue and be sued. In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and the expansion and promotion of the market of Washington apples on behalf of Washington apple growers. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers in the amount of 12 cents per each 100 pounds of gross billing weight of all apples grown and packed in the state of Washington. Such assessments totalled $1,737,-990.00 for the crop year 1974. Said assessments will be increased to 14 cents, effective September 1, 1975. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state.

5. All defendants are residents and citizens of North Carolina and their official residences are located within the

state of North Carolina and within the jurisdiction and venue of this court. Defendant James E. Holshouser, Jr., Governor of the state of North Carolina; defendant Rufus L. Edmisten, Attorney General for the state of North Carolina; and defendant James A. Graham, the Commissioner of Agriculture for the state of North Carolina, are officials of the state of North Carolina who are charged with the duty and responsibility of administering and enforcing the North Carolina statute mentioned herein.

6. The General Statutes of North Carolina, §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

Said statute is presently in effect and will apply to the 1975 Washington State apple crop shipped into the state of North Carolina.

7. The Washington State apple industry produces approximately one-half of all apples grown in the United States which are shipped fresh in closed containers in interstate commerce and is the major shipper of apples into the state of North Carolina after approximately November of each year. For the crop year 1974, Washington growers shipped approximately 339,000 boxes of apples directly to the state of North

Carolina worth well in excess of $1,000,000.00. Additionally, in the 1974 crop year approximately 140,000 boxes of Washington apples were indirectly trans-shipped and sold to North Carolina buyers by distributors in surrounding states. The Washington Apple Commission spends substantial sums of money in advertising Washington apples and the Washington State apple grade within the state of North Carolina. For the crop year 1974, the Washington Apple Commission spent in excess of $25,000.00 for consumer advertising and trade promotion of Washington apples sold within the state of North Carolina.

8. The apples shipped into the state of North Carolina by Washington State apple growers are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by both the United States Department of Agriculture and the Washington State Department of Agriculture. The applicable laws of the United States Government and the laws of the state of Washington and the regulations issued pursuant thereto govern the operation of this inspection system. Washington produced apples must be graded according to either Washington State apple standards (Washington State grade) or U. S. Department of Agriculture standards (U. S. grade), and such grade must be shown on all closed containers packed within the state of Washington. Washington State standards for apple grades are equal or superior to the standards of all equivalent U. S. grades. Over the years, the Washington State grade, as a result of strict enforcement of the inspection system, has developed and enjoys a superior trade acceptance and marketability in the industry because of grade consistency, uniformity and dependability.

9. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety pre-printed on the containers. As a result, substantial economies have been ef-

fected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said pre-printed containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense, and give the container a mutilated appearance with consequent loss of acceptability.

10. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, is being forced to abandon the display of the Washington State grade and to substitute containers preprinted with the U. S. grade.

11. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers.

12. There is no bona fide public purpose served by requiring the obliteration of Washington State grades and the showing of the U. S. grade in lieu thereof, since Washington State grades are equal or superior to comparable U. S. grades in every respect. Nevertheless, the defendants and each of them, acting in their official capacities, threaten to enforce said statute, and the criminal penalties thereof,

against any person who violates the marking requirements of the North Carolina statute.

13. Washington State apple growers, and plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on interstate commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00 and the Washington State apple industry, as represented by plaintiff, will continue to sustain such irreparable injury, damage and loss, unless the court grants the relief prayed for herein. All said burdens and restraints placed on interstate commerce by said North Carolina statute are in violation of the Commerce Clause of Article I, Section 8, of the U. S. Constitution.

14. By way of further claim, the plaintiff alleges the North Carolina statute referred to herein was intended to insulate the North Carolina apple industry from outside competition and was enacted to treat apples differently from any other fresh fruit or commodity even though there was no stated or apparent reason for disparate treatment. Specifically, there is no rational basis for distinguishing apples from other types of fresh produce in the requirement that state grades be removed from closed containers of apples and U. S. grades only be shown instead, while allowing state grades only to be shown on closed containers of other fresh produce. Moreover, for no apparent reason, apples sold in "closed containers" are singled out for different treatment, under the North Carolina statute, than apples sold in open containers. Because of this disparate treatment, the North Carolina statute is violative of the equal protection clause of the Fourteenth Amendment of the U. S. Constitution.

15. By way of further claim, plaintiff alleges that because of the facts and circumstances herein set forth, the North Carolina statute deprives Washington State apple

growers and the plaintiff of their property rights without due process of law and constitutes a violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution.

16. By way of further claim, plaintiff alleges that the North Carolina statute was intended to and does impose an unreasonable burden upon the rights of Washington State apple growers to exercise their right of free speech and, specifically, upon the plaintiff's right to display its state grades. Further, by requiring the obliteration of Washington State grades, this statute infringes upon the right of North Carolina apple buyers to know and use the Washington State apple grade in making their purchases in interstate commerce. Washington State apple grades have a long history, a common and well-known meaning, and a wide trade acceptance and dependence. This infringement of the right to know and the right of free speech violate the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

17. The plaintiff has no adequate remedy at law in that total damages would be perpetual and impossible to accurately measure or recover.

18. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing only the applicable Washington State grade and without any requirement that a U. S. grade be shown.

SECOND CAUSE OF ACTION

19. Plaintiff realleges Paragraphs 1 through 17 above.

20. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing the Washington State grade thereon in addition to any U. S. grade shown.

WHEREFORE, the plaintiff prays:

UNDER THE FIRST CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G. S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, violates Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

(c) That this cause be advanced on a docket of this court for an early hearing, and this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G. S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

UNDER THE SECOND CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G. S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, violates Article 1, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple

growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grades, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G. S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

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(Verification omitted in printing.)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF JOSEPH T. BROWNLOW

(Filed 19 September 1975)

JOSEPH T. BROWNLOW, being first duly sworn on oath, deposes and says:

1. I am the Manager of the Washington State Apple Advertising Commission (Washington Apple Commission), which has its headquarters in Wenatchee, Washington.

2. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers in the amount of 14 cents (12 cents prior to September 1, 1975) per each 100 pounds of gross billing weight on all apples grown and packed in the state of Washington. Such assessments totalled $1,737,990.00 for the 1974 crop year.

3. Washington State is the nation's leading producer of apples, producing approximately 30% of the apples grown in the United States. Approximately 75% of this production is graded and packed and sold in closed containers for the fresh market. The balance is sold for processing. Of the apples sold in the fresh market, approximately 3% are exported to foreign countries, an additional 4% are sold and consumed in the state of Washington, and the remaining 93% are sold domestically in the other states. Approximately 50% of all apples shipped in closed containers to the fresh markets in interstate commerce are apples grown in the state of Washington.

4. Based upon statistics gathered by the Washington Apple Commission, Washington State growers in the 1974 crop year shipped approximately 339,000 boxes of apples directly to the state of North Carolina worth in excess of $2,000,000.00. For the same year, approximately 140,000 additional boxes of Washington apples were indirectly transshipped to North Carolina buyers by distributors and retailers in surrounding states.

5. During the 1974 crop year, Washington apple consumer advertising expenditures by the Washington Apple Commission in the state of North Carolina were in excess of $25,000.00.

6. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety preprinted on the containers. As a result, substantial economies have been effected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said preprinted containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense, and give the container a mutilated appearance with consequent loss of acceptability.

7. Based upon statistics gathered and investigations made by the Washington Apple Commission, it has been ascertained it cost Washington apple shippers from 5 cents to 15 cents per box to comply with North Carolina G. S. §106-189.1. The cost for each shipper varies depending upon how many sides of the carton is preprinted with the

Washington State grade, how large the Washington State grade is printed, whether the cartons must be depalletized, and how the obliteration is accomplished. It is estimated it cost Washington apple growers in excess of $30,000.00 in each of the 1973 and 1974 crop years to comply with the North Carolina regulation. There will be a similar per box cost of compliance during the 1975 crop year for those containers preprinted with the Washington State grade and such damage will be immediate and irreparable.

8. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, is being forced to abandon the display of the Washington State grade and to substitute containers preprinted with the U. S. grade.

9. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers.

10. Washington apples sold at retail rarely are in closed containers, showing the Washington State grade, except for those sold in prepacked plastic bags.

11. Washington State apple grades have been in existence approximately sixty years and have gained a substantial trade acceptance and meaning in the fresh fruit wholesaling business. U. S. grades standards for boxed apples have been in existence since 1930. Since the Agricultural Adjustment Act, establishing joint federal and state inspections, allows for substantial regional control throughout the United States over inspection services, there is a lack of uniformity of interpretation of U. S. grades standards between states. On the other hand, Washington State apple grades are given careful, uniform and consistent application within the state of Washington. Moreover, all apples which are shipped out of the state of Washington must meet stringent and mandatory inspection requirements. This mandatory inspection at the point of origin is unique throughout the apple industry. Washington State grades emphasize color to a much greater degree than do U. S. grades. It is common for apple dealers outside the state of Washington to buy using the Washington State grades in preference to U. S. grades because of their consistent application, emphasis on color and supporting mandatory inspections.

12. On August 16, 1974, with a follow-up letter dated September 16, 1974, affiant wrote James A. Graham, Commissioner of Agriculture for the state of North Carolina, forwarding a published copy of the Washington State standards for apples, which equal or exceed the U. S. Department of Agriculture standards for apples, requesting permission to ship apples in closed containers to North Carolina showing both the Washington grade and the U. S. grade. The North Carolina Commissioner of Agriculture replied by letter dated September 18, 1974, denying permission to show both Washington State and U. S. grades, stating:

> I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting.

Subsequently affiant received a letter dated October 17, 1974, from the Attorney General for the State of North

Carolina stating that it would require the General Assembly of North Carolina to amend or rescind North Carolina General Statute §106-189.1 before apples in closed containers could be shipped from the state of Washington into North Carolina bearing the Washington State grade in addition to the U. S. grade. Copies of these letters are attached hereto and incorporated herein as Exhibits "A", "B", "C" and "D".

13. The Washington Apple Commission is an agency of the state of Washington created by an act of the Washington Legislature, as set forth in RCW 15.24. Among the purposes for which the Commission was created, as set forth in RCW 15.24.900, are, in the exercise of the police power of the state, stabilization and protection of the apple industry, and the expanding and promotion of its markets. The Commission is empowered to sue and be sued under RCW 15.24.070 in the exercise of its powers and purposes on behalf of Washington State and its apple industry.

JOSEPH T. BROWNLOW

(Jurat omitted in printing)

(Exhibits A, B and D omitted in printing)

EXHIBIT "C"

STATE OF NORTH CAROLINA
Department of Agriculture
Raleigh

James A. Graham, Commissioner

Sept. 18, 1974

Mr. Joseph T. Brownlow, Manager
Washington Apple Commission
P. O. Box 18
Wenatchee, Washington 98801

Dear Mr. Brownlow:

I regret this delay in replying to your letter of August 16. Actually, the letter was late arriving in my office and it was passed on for review by other members of my staff which, together, account for this delay.

I can appreciate the reason for your request for permission to ship Washington state apples into into North Carolina bearing both the Washington state and U. S. grades. As you know, however, before such permission can be granted, it will be necessary to have the law which was passed in the 1973 legislature amended to permit this. I naturally want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed and I have asked the Secretary of the Apple Growers Association to bring this matter to the attention of their Board at its next meeting.

I will be pleased to keep you informed of their expressed sentiments to me.

Cordially,

JAMES A. GRAHAM

James A. Graham
JAG/k

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF STEWART BLEDSOE

(Filed 19 September 1975)

STEWART BLEDSOE, being first duly sworn on oath, deposes and says:

1. I am the Director of the Washington State Department of Agriculture.

2. On July 26, 1974, I promulgated Washington State standards for apples under Order No. 1374 to become effective September 1, 1974. These standards are incorporated into Washington Administrative Code §16-403-135, et seq. The Washington State standards for apple grades are equivalent to or better than the comparable U. S. standards for grades of apples and exceed the U. S. standards in the following respects:

(a) The Washington State standards for apples require a higher intensity of red color in the red varieties of apples than do the U. S. standards.

(b) The Washington State standards for apples require well formed apples in the extra fancy grade for the Golden Delicious variety and the U. S. standards require only a fairly well formed apple.

(c) In many respects, the Washington standards for apples require a smaller area of defects and blemishes than do the U. S. standards, and in no case do the

Washington State standards allow a greater area of defects and blemishes than do the U. S. standards.

* * *

3. Apples exported from the state of Washington to sister states are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by the U. S. Department of Agriculture and the Washington State Department of Agriculture. The applicable laws and regulations of the U. S. Government and the laws and regulations of the state of Washington govern the operation of this system. The Washington packed apples must be graded according to either Washington State or U. S. Department of Agriculture apple grades, and such grades must be shown on all containers packed within the state of Washington. The Washington State apple grades are vigorously enforced by inspectors who are authorized to grade either by Washington State apple grades or U. S. Department of Agriculture grades.

4. Washington State requires the inspection of all apples and that they be in full compliance at the time of shipment with the grade standards displayed on the container. This mandatory inspection system for apples, which includes all apples shipped from the state of Washington in interstate commerce or in foreign commerce, is unique among apple producing states and the state of Washington is the only state requiring such inspection.

STEWART BLEDSOE

(Jurat omitted in printing)

(Attachment omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

MOTION TO DISMISS

(Filed 7 October 1975)

NOW COME the defendants herein, through their attorneys, and move the Court for an order dismissing the action for the following reasons:

I.

Defendants move the Court, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's action because the action is not being prosecuted by the real party in interest.

In support of its motion, defendants show unto the Court the following:

1. Plaintiff is an agency charged with the "expansion and promotion of the market of Washington apples on behalf of Washington apple growers." (Complaint p. 3).

2. Plaintiff "spends substantial sums of money in *advertising* Washington apples . . ." (Complaint p. 4) (emphasis added).

3. Plaintiff neither grows nor sells apples, but is purely and simply an advertising agency for the Washington State apple growers.

4. Rule 17 of the Federal Rules of Civil Procedure require that every action be prosecuted in the name of the real party in interest.

5. Defendants believe, and therefore allege, that the real parties in interest in this matter are the growers and shippers of Washington apples.

6. Defendants believe, and therefore allege, that the plaintiff is without standing to litigate this matter in that it cannot show injury to any legally protected interest which it can rightfully claim.

II.

Defendants move the Court, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for an order dismissing plaintiff's complaint for the reason that the Court lacks jurisdiction over the subject matter.

In support of the motion, the defendants show unto the Court the following:

1. The plaintiff alleges that the Court has jurisdiction of the action under 28 U.S.C. §1331. For the Court to have jurisdiction under that section, the matter in controversy must exceed the sum of $10,000.00. This threshold jurisdictional requirement cannot be met by the plaintiff in this matter, notwithstanding his broadside allegations to the contrary. (Complaint p. 1).

2. Plaintiff does not claim that it grows or ships apples to North Carolina. It does not claim that North Carolina Gen. Stat. 106-189.1 requires or results in the expenditure, or loss, by the plaintiff, of a single dollar. Plaintiffs allegations of monetary loss are allegations that individuals other than plaintiff have suffered loss, or will suffer loss. Those allegations are insufficient to meet the jurisdictional amount requirement imposed by 28 U.S.C. §1331.

III.

Defendants request an early hearing of this Motion to Dismiss, as the disposition of the Motion may render

unnecessary the hearing which plaintiff has requested in its Motion for a preliminary injunction.

Dated: 7 October, 1975.

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(Certificate of service omitted in printing.)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

FIRST AMENDED COMPLAINT TO DECLARE SECTION 189.1 OF CHAPTER 106 OF THE NORTH CAROLINA GENERAL STATUTES UNCONSTITUTIONAL AND ENJOIN ENFORCEMENT THEREOF

(Filed 5 December 1975)

Plaintiff complaining alleges:

FIRST CAUSE OF ACTION

1. This is an action seeking an injunction restraining the enforcement of a statute of the state of North Carolina upon the ground of unconstitutionality of such statute. This action presents a question of law under the Constitution and laws of the United States as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. Plaintiff seeks a declaratory judgment that Section 189.1 of Chapter 106 of the North Carolina General Statutes (G. S. §106-189.1), to the extent the same applies to the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers, on the grounds that it constitutes an unreasonable burden and restriction upon interstate commerce and is in violation of the Commerce Clause of the Constitution of the United States, Article I, Section 8; that it violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; and that it violates the civil rights of the individual Washington State apple growers, as

represented by Plaintiff and those of Plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States. Plaintiff asks that an injunction be granted to it permanently restraining the enforcement of said statute by the defendants against the sale, offer of sale or shipment into North Carolina of Washington State apples in closed containers.

3. This court has original jurisdiction of this action under 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §2201, and 28 U.S.C. §2202. This action arises under the Constitution of the United States, specifically Article I, Section 8, and the First and Fourteenth Amendments and 42 U.S.C. §1983. Plaintiff seeks the convening of a three-judge court pursuant to 28 U.S.C. §2281 and §2284 because an injunction is sought restraining, on Federal grounds, the enforcement of execution of the North Carolina statute mentioned herein.

4. The plaintiff, Washington State Apple Advertising Commission, herein also referred to as the "Washington Apple Commission", is an agency of the state of Washington, and created by an act of the Washington Legislature as set forth in Revised Code of Washington 15.24. The plaintiff is a corporate body empowered by statute to sue and be sued. In addition, the Washington Apple Commission is charged, among other things, by statute with the stabilization and protection of the Washington State apple industry and its general welfare, and with the expansion and protection of the foreign and domestic markets of Washington apples on behalf of individual Washington apple growers. A copy of Revised Code of Washington 15.24, the statute under which the Apple Commission was created and which sets forth its powers and duties, is attached hereto as Exhibit A and incorporated herein.

5. The Washington Apple Commission is financed by assessments levied on all Washington State apple growers

in the amount of 12 cents per each 100 pounds of gross billing weight of all apples grown and packed in the state of Washington. Such assessments totalled $1,737,990.00 for the crop year 1974. Said assessments were increased to 14 cents, effective September 1, 1975. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state.

6. All defendants are residents and citizens of North Carolina and their official residences are located within the state of North Carolina and within the jurisdiction and venue of this court. Defendant James E. Holshouser, Jr., Governor of the state of North Carolina; defendant Rufus L. Edmisten, Attorney General for the state of North Carolina; and defendant James A. Graham, the Commissioner of Agriculture for the state of North Carolina, are officials of the state of North Carolina who are charged with the duty and responsibility of administering and enforcing the North Carolina statute mentioned here.

7. The General Statutes of North Carolina, §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

> (a) All apples sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle, no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars (50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

Said statute is presently in effect and will apply to the 1975 Washington State apple crop shipped into the state of North Carolina.

8. The Washington State apple industry produces approximately one-half of all apples grown in the United States which are shipped fresh in closed containers in interstate commerce and is the major shipper of apples into the state of North Carolina after approximately November of each year. For the crop year 1974, Washington growers shipped approximately 339,000 boxes of apples directly to the state of North Carolina worth well in excess of $1,000,000.00. Additionally, in the 1974 crop year approximately 140,000 boxes of Washington apples were indirectly trans-shipped and sold to North Carolina buyers by distributors in surrounding states. The Washington Apple Commission spends substantial sums of money in advertising Washington apples and the Washington State apple grade within the state of North Carolina. For the crop year 1974, the Washington Apple Commission spent in excess of $25,000.00 for consumer advertising and trade promotion of Washington apples sold within the state of North Carolina.

9. The apples shipped into the state of North Carolina by Washington State apple growers are subject to rigorous standards of grade and quality which are enforced by a comprehensive inspection system jointly administered by both the United States Department of Agriculture and the Washington State Department of Agriculture. The applicable laws of the United States Government and the laws of the state of Washington and the regulations issued pursuant thereto govern the operation of this inspection system. Washington produced apples must be graded according to either Washington State apple standards (Washington State grade) or U. S. Department of Agriculture standards (U. S. grade), and such grade must be shown on all closed containers packed within the state of Washington. Washington State standards for apple grades are equal or superior to the standards of all equivalent U. S. grades. Over the years, the Washington State grade, as a result of strict enforcement of the inspection system, has developed and enjoys a

superior trade acceptance and marketability in the industry because of grade consistency, uniformity and dependability.

10. It has been the practice of Washington State apple growers to order apple containers well before harvest, with the Washington state grade and variety pre-printed on the containers. As a result, substantial economies have been effected through such standardization of packaging and handling and by eliminating hand marking at the time of packing. The North Carolina statute has disrupted said procedures and economies by forcing the obliteration of Washington State grade on said pre-printed containers of Washington apples and individual re-marking with the U. S. grade either prior to shipment or after receipt in North Carolina. These requirements interfere with the orderly marketing of Washington State apples, result in confusion, special handling, inconvenience and expense to the individual growers thereof, and give the container a mutilated appearance with consequent loss of acceptability.

11. The great majority of Washington State apple growers prefer to ship their apples under the Washington State grade because of its superior standards and premium trade acceptance. In increasing numbers, however, because of the burdensome requirements of the North Carolina statute, the Washington State apple industry and its individual growers, in order to continue to sell, offer for sale and ship apples into the state of North Carolina as a part of its established and existing marketing channels, are being forced to abandon the display of the Washington State grade and to substitute containers pre-printed with the U. S. grade.

12. As a further direct result of the burdensome requirements of the North Carolina statute, some Washington State growers have refused to ship apples to North Carolina and some North Carolina buyers have refused to purchase apples from Washington State growers causing said growers to suffer irreparable injury.

13. There is no bona fide public purpose served by requiring the obliteration of Washington State grades and the showing of the U. S. grade in lieu thereof, since Washington State grades are equal or superior to comparable U. S. grades in every respect. Nevertheless, the defendants and each of them, acting in their official capacities, threaten to enforce said statute, and the criminal penalties thereof, against any person who violates the marking requirements of the North Carolina statute.

14. Washington State apple growers, and plaintiff, have suffered real, immediate, substantial and irreparable injury, damage and loss since the passage of the North Carolina statute as a result of the restraints and burdens on interstate commerce imposed as alleged herein. Said injury, damage and loss has amounted to more than $10,000.00 and the Washington State apple industry and its individual growers, as represented by plaintiff, will continue to sustain such irreparable injury, damage and loss, unless the court grants the relief prayed for herein. All said burdens and restraints placed on interstate commerce by said North Carolina statute are in violation of the Commerce Clause of Article I, Section 8, of the U. S. Constitution.

15. By way of further claim, the plaintiff alleges the North Carolina statute referred to herein was intended to insulate the North Carolina apple industry from outside competition and was enacted to treat apples differently from any other fresh fruit or commodity even though there was no stated or apparent reason for disparate treatment. Specifically, there is no rational basis for distinguishing apples from other types of fresh produce in the requirement that state grades be removed from closed containers of apples and U. S. grades only be shown instead, while allowing state grades only to be shown on closed containers of other fresh produce. Moreover, for no apparent reason, apples sold in "closed containers" are singled out for different treatment, under the North Carolina statute, than apples sold in open containers. Because of this disparate treatment, the North Carolina statute is violative of the equal protection clause of the Fourteenth Amendment of the U. S. Constitution.

16. By way of further claim, plaintiff alleges that because of the facts and circumstances herein set forth, the North Carolina statute deprives Washington State apple growers and the plaintiff of their property rights without due process of law and constitutes a violation of the due process clause of the Fourteenth Amendment of the U. S. Constitution and 42 U.S.C. §1983.

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17. By way of further claim, plaintiff alleges that the North Carolina statute was intended to and does impose an unreasonable burden upon the rights of individual Washington State apple growers to exercise their right of free speech and, specifically, upon the right of plaintiff and individual growers to display the Washington State grades. Further, by requiring the obliteration of Washington State grades, this statute infringes upon the right of North Carolina apple buyers to know and use the Washington State apple grade in making their purchases in interstate commerce. Washington State apple grades have a long history, a common and well-known meaning, and a wide trade acceptance and dependence. This infringement of the right to know and the right of free speech violate the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution.

18. The plaintiff, and the individual Washington apple growers, have no adequate remedy at law in that total damages would be perpetual and impossible to accurately measure or recover.

19. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing only the applicable Washington State grade and without any requirement that a U. S. grade be shown.

SECOND CAUSE OF ACTION

20. Plaintiff realleges Paragraphs 1 through 18 above.

21. Washington State apple growers are entitled to sell, offer for sale, and ship their apples into the state of North Carolina in closed containers showing the Washington State grade thereon in addition to any U. S. grade shown.

WHEREFORE, the plaintiff prays:

UNDER THE FIRST CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2281 and §2284.

(b) That the court determine and declare pursuant to 28 U.S.C. §2210 that North Carolina G.S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, violates Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the rights of free

speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed by the First Amendment of the U. S. Constitution as incorporated into the due process clause of the Fourteenth Amendment of the U. S. Constitution; and that said statute violates the civil rights of the individual Washington State apple growers, as represented by plaintiff and those of plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G.S. §106-189.1, to the extent the same applies to the sale, offer for sale or shipment into North Carolina of Washington State apples in closed containers, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause, the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

UNDER THE SECOND CAUSE OF ACTION

(a) That a three-judge court be convened pursuant to 28 U.S.C. §2210 that North Carolina G.S. §106-189.1, to the extent the same prohibits the display of Washington

State grades on closed containers of Washington apples, violate Article I, Section 8, of the United States Constitution and constitutes an unreasonable burden and restriction upon interstate commerce of the United States; that said statute violates the equal protection clause of the Fourteenth Amendment by providing that apples be treated differently and distinctly from other fresh fruits and vegetables and apples shipped in open containers; that said statute violates the due process clause of the Fourteenth Amendment by depriving the plaintiff and Washington State apple growers of their property rights in the conduct of their business in the state of North Carolina without due process of law; that said statute infringes upon the right of free speech guaranteed to the plaintiff and to Washington State apple growers to display and use their state grade in marketing their apples outside the state of Washington, and the right of buyers to know and use said grade, all as guaranteed into the due process clause of the Fourteenth Amendment of the U. S. Constitution; and that said statute violates the civil rights of the individual Washington State apple growers, as represented by plaintiff and those of plaintiff, including the rights of free speech, due process and equal protection secured by the Constitution of the United States.

(c) That this cause be advanced on a docket of this court for an early hearing, and that this court issue a preliminary injunction after notice restraining and enjoining the defendants, James E. Holshouser, Jr., Governor of the state of North Carolina, Rufus L. Edmisten, Attorney General of the state of North Carolina, and James A. Graham, Commissioner of Agriculture of the state of North Carolina, from enforcing the provisions of North Carolina G.S. §106-189.1, to the extent the same prohibits the display of Washington State grades on closed containers of Washington apples, and that this preliminary injunction be effective against any persons whomsoever, pending the hearing and determination of this cause; and that upon the hearing of this cause,

the injunction prayed for in the foregoing paragraph be made permanent and perpetual.

(d) That the plaintiff have its costs and such other and further relief as to this court may appear just and equitable.

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(Verification and certificate of service omitted in printing)

EXHIBIT A

CHAPTER 15.24

APPLE ADVERTISING COMMISSION

Sections

15.24.010 Definitions.

15.24.020 Commission created — Qualifications of members.

15.24.030 Members—Election—Terms of office—District subdivisions—Meetings of commission.

15.24.040 Members—Nominations—Method of election.

15.24.050 Vacancies—Quorum—Compensation.

15.24.060 Commission records as evidence.

15.24.070 Powers and duties.

15.24.080 Research, advertising, and educational campaign.

15.24.085 Promotional printing not restricted by public printer laws.

15.24.086 Promotional printing contracts — Contractual conditions of employment.

15.24.090 Report to director—Increased assessments.

15.24.100 Assessments levied.

15.24.110 Collection—Due date—Stamps.

15.24.120 Records kept by dealers, handlers, processors.

15.24.130 Returns rendered by dealers, handlers, processors.

15.24.140 Right to inspect.

15.24.150 Treasurer—Bond—Duties—Funds.

15.24.160 Promotional plans—Cooperation of commission.

15.24.170 Rules and regulations—Filing—Publication.

15.24.180 Enforcement.

15.24.190 Nonliability of state, members, employees.

15.24.200 Penalties.

15.24.210 Prosecutions.

15.24.900 Purpose of chapter.

15.24.910 Liberal construction.

15.24.920 Severability, chapter 240, Laws of 1967.

15.24.010 *Definitions.* As used in this chapter:

(1) "Commission" means the Washington state apple advertising commission;

(2) "Ship" means to load apples into a conveyance for transport, except apples being moved from the orchard where grown to a packing house or warehouse within the immediate area of production;

(3) "Handler" means any person who ships or initiates a shipping operation, whether for himself or for another;

(4) "Dealer" means any person who handles, ships, buys, or sells apples, or who acts as sales or purchasing agent, broker, or factor of apples;

(5) "Processor" and "processing plant" means every person to whom and every place to which apples are delivered for drying, dehydrating, canning, pressing, powdering, extracting, cooking, or for use in producing a product or manufacturing a manufactured article;

(6) "Processing apples" means all apples delivered to a processing plant for drying, dehydrating, canning, pressing, powdering, extracting, cooking, or for use in producing a product or manufacturing a manufactured article;

(7) "Fresh apples" means all apples other than processing apples;

(8) "Director" means the director of the department of agriculture or his duly authorized representative;

(9) "District No. 1" includes the counties of Chelan, Okanogan, and Douglas;

(10) "District No. 2" includes the counties of Kittitas, Yakima, Benton, and Franklin;

(11) "District No. 3" includes all counties in the state not included in the first and second districts; and

(12) "Executive officer" includes, but is not limited to, the principal management executive, sales manager, general manager, or other executive employee of similar responsibility and authority.

15.24.020 *Commission created — Qualifications of members.* There is hereby created a Washington state apple advertising commission to be thus known and designated. The commission shall be composed of nine practical apple producers and four practical apple dealers. The director shall be an ex officio member of the commission without vote.

The nine producer members shall be citizens and residents of this state, over the age of twenty-five years, each of whom, either individually or as an executive officer of a corporation, firm or partnership, is and has been actually engaged in growing and producing apples within the state of

Washington for a period of five years, and has during that period derived a substantial portion of his income therefrom: *Provided,* That he may own and operate an apple warehouse and pack and store apples grown by others, without being disqualified, so long as a substantial quantity of the apples handled in such warehouse are grown by him; and he may sell apples grown by himself and others so long as he does not sell a larger quantity of apples grown by others than those grown by himself. The four dealer members shall be persons who, either individually or as executive officers of a corporation, firm, partnership, association, or cooperative organization, are and have been actively engaged as dealers in apples within the state of Washington for a period of five years, and are citizens and residents of this state. The qualifications of members of the commission as herein set forth must continue during their term of office.

15.24.030 *Members — Election — Terms of office — District subdivisions — Meetings of commission.* Thirteen persons with the qualifications stated in RCW 15.24.020 as amended in section 23, chapter 240, Laws of 1967 shall be elected members of said commission. Four of the grower members, being positions one, two, three and four, shall be from district No. 1, at least one of whom shall be a resident of and engaged in growing and producing apples in Okanogan county; four of the grower members, being positions five, six, seven and eight, from district No. 2; and one grower member, being position nine from district No. 3. Two of the dealer members, being positions ten and eleven, shall be from district No. 1; and two of the dealer members, being positions twelve and thirteen, shall be from district No. 2.

The commission shall have authority in its discretion to establish by regulation one or more subdivisions of district No. 1 and one or more subdivisions of district No. 2; provided that each of the same includes a substantial apple producing district or districts, and provided the same does

not result in an unfair or unequitable voting situation or an unfair or unequitable representation of apple growers on said commission. In such event each of said subdivisions shall be entitled to be represented by one of the said grower members of the commission, who shall be elected by vote of the qualified apple growers in said subdivision of said district, and who shall be a resident of and engaged in growing and producing apples in said subdivision.

The regular term of office of the members of the commission shall be three years from March 1 following their election and until their successors are elected and qualified. The commission shall hold its annual meeting durirg the month of March each year for the purpose of electing officers and the transaction of other business and shall hold such other meetings during the year as it shall determine.

15.24.040 *Members -- Nominations — Method of Election.* The director shall call a meeting of apple growers in each of the three districts and meetings of apple dealers in district No. 1 and district No. 2 for the purpose of nominating their respective members of the commission, when a term is about to expire, or when a vacancy exists, except as provided in RCW 15.24.050, as amended, at times and places to be fixed by the commission. Said meetings shall be held not later than February 15th of each year and insofar as practicable, the said meetings of the growers shall be held at the same time and place as the annual state and district meetings of the Washington state horticultural association and its affiliated clubs, but not while the same are in actual session. Public notice of such meetings shall be given by the commission in such manner as it may determine: *Provided,* That nonreceipt of the notice by any interested person shall not invalidate the proceedings. Any qualified person may be nominated orally for such positions at the said respective meetings. Nominations may also be made within five days after any such meeting by written petition filed in the Wenatchee office of the commission, signed by not less than

five apple growers or dealers, as the case may be, residing within the district or within the subdivision if the nomination is made from a subdivision.

The members of the commission shall be elected by secret mail ballot under the supervision of the director: *Provided,* That in any case where there is but one nomination for a position, a secret mail ballot shall not be conducted or required and the director shall certify the candidate to be elected. Grower members of the commission shall be elected by a majority of the votes cast by the apple growers in the respective districts or subdivisions thereof, as the case may be, each grower who operates a commercial producing apple orchard, whether an individual proprietor, partnership, joint venture, or corporation, being entitled to one vote. As to bona fide leased or rented orchards, only the lessee-operator, if otherwise qualified, shall be entitled to vote. An individual commercial orchard operator, if otherwise qualified, shall be entitled to vote as such, even though he is also a member of a partnership or corporation which votes for other apple acreage. Dealer members of the commission shall be elected by a majority of the votes cast by the apple dealers in the respective districts, each dealer being entitled to one vote. If a nominee does not receive a majority of the votes on the first ballot, a run-off election shall be held by mail in a similar manner between the two candidates for such position receiving the largest number of votes.

15.24.050 *Vacancies — Quorum — Compensation.* In the event a position becomes vacant due to resignation, disqualification, death, or for any other reason, such position until the next annual meeting shall be filled by vote of the remaining members of the commission. At such annual meeting a commissioner shall be elected to fill the balance of the unexpired term.

A majority of the voting members shall constitute a quorum for the transaction of all business and the carrying out of the duties of said commission.

No member of the commission shall receive any salary or other compensation, but each member shall receive a sum to be determined by the commission but not more than twenty dollars per day for each day spent in actual attendance on or traveling to and from meetings of the commission, or on special assignment for the commission, together with actual expenses incurred in carrying out the provisions of this chapter.

15.24.060 *Commission records as evidence.* Copies of the proceedings, records and acts of the commission, when certified by the secretary and authenticated by the corporate seal, shall be admissible in any court as prima facie evidence of the truth of the statements contained therein.

15.24.070 *Powers and duties.* The Washington state apple advertising commission is hereby declared and created a corporate body. The powers and duties of the commission shall include the following:

(1) To elect a chairman and such other officers as it deems advisable; and to adopt, rescind, and amend rules, regulations, and orders for the exercise of its powers hereunder, which shall have the force and effect of the law when not inconsistent with existing laws;

(2) To administer and enforce the provisions of this chapter, and do all things reasonably necessary to effectuate the purposes of this chapter;

(3) To employ and at its pleasure discharge a manager, secretary, agents, attorneys, and employees as it deems necessary, and to prescribe their duties and powers and fix their compensation;

(4) To establish offices and incur expense and enter into contracts and to create such liabilities as may be reasonable for the proper administration and enforcement of this chapter;

(5) To investigate and prosecute violations hereof;

(6) To conduct scientific research to develop and discover the health, food, therapeutic, and dietetic value of apples and products thereof;

(7) To keep accurate record of all its dealings, which shall be open to inspection and audit by the state auditor;

(8) To sue and be sued, adopt a corporate seal, and have all of the powers of a corporation.

15.24.080 *Research, advertising, and educational campaign.* The commission shall provide for and conduct a comprehensive and extensive research, advertising and educational campaign as continuous as the crop, sales and market conditions reasonably require. It shall investigate and ascertain the needs of producers, conditions of the markets and extent to which public convenience and necessity require research and advertising to be conducted.

15.24.085 *Promotional printing not restricted by public printer laws.* The restrictive provisions of chapter 43.78 shall not apply to promotional printing and literature for the Washington state apple advertising commission, the Washington state fruit commission, or the Washington state dairy products commission.

15.24.086 *Promotional printing contracts — Contractual conditions of employment.* All such printing contracts provided for in this section and RCW 15.24.085 shall be executed and performed under conditions of employment which shall substantially conform to the laws of this state respecting hours of labor, the minimum wage scale for women and minors, and the rules and regulations of the industrial welfare committee regarding conditions of employment, hours of labor, and minimum wages, and the violation of such

provision of any contract shall be ground for cancellation thereof.

15.24.090 *Report to director — Increased assessments.* If it appears from investigation by the commission that the revenue from the assessment levied on fresh apples hereunder is inadequate to accomplish the purposes of this chapter the commission shall adopt a resolution setting forth the necessities of the industry, extent and probable cost of the required research, market promotion and advertising, extent of public convenience, interest and necessity, and probable revenue from the assessment levied. It shall thereupon increase the assessment to such sum as shall be determined by the commission to be necessary for such purposes based upon a rate per one hundred pounds of apples, gross billing weight, shipped in bulk, container or any style of package; but no increase shall be made prior to adoption of said resolution. An increase shall become effective sixty days after such resolution is adopted: *Provided,* That no increase in such assessment shall become effective unless the same shall be first referred by the commission to a referendum mail ballot by the apple growers of this state conducted under the supervision of the director and be approved by a majority of such growers voting thereon and also be approved by voting growers who operate more than fifty percent of the acreage voted in the same election: *Provided further,* That after such mail ballot, if the same be favorable to such increase, the commission shall nevertheless exercise its independent judgment and discretion as to whether or not to approve such increase: *And provided further,* That in any event such increase shall not amount to more than two cents per one hundred pounds of apples, gross billing weight, in any one year.

15.24.100 *Assessments levied.* There is hereby levied upon all fresh apples grown annually in this state, and all apples packed as Washington apples, an assessment of twelve cents on each one hundred pounds gross billing weight, plus such

annual increases thereof as are imposed pursuant to the provisions of RCW 15.24.090. All moneys collected hereunder shall be expended to effectuate the purpose and objects of this chapter.

15.24.110 *Collection — Due date — Stamps.* The assessments on fresh apples shall be paid, or provision made therefor satisfactory to the commission, prior to shipment, and no fresh apples shall be carried, transported, or shipped by any person or by any carrier, railroad, truck, boat, or other conveyance until the assessment has been paid or provision made therefor satisfactory to the commission.

The commission shall by rule or regulation prescribe the method of collection, and for that purpose may require stamps to be known as "apple advertising stamps" to be purchased from the commission and attached to the containers, invoices, shipping documents, inspection certificates, releases, or receiving receipts or tickets.

15.24.120 *Records kept by dealers, handlers, processors.* Each dealer, handler, and processor shall keep a complete and accurate record of all apples handled, shipped, or processed by him. This record shall be in such form and contain such information as the commission may by rule or regulation prescribe, and shall be preserved for a period of two years, and be subject to inspection at any time upon demand of the commission or its agents.

15.24.130 *Returns rendered by dealers, handlers, processors.* Each dealer, handler, and processor shall at such times as the commission may by rule or regulation require, file with the commission a return under oath on forms to be furnished by the commission, stating the quantity of apples handled, shipped, or processed by him during the period prescribed by the commission. The return shall contain such further information as the commission may require.

15.24.140 *Right to inspect.* The commission may inspect the premises and records of any carrier, handler, dealer, or processor for the purpose of enforcing this chapter and the collection of the excise tax.

15.24.150 *Treasurer — Bond — Duties — Funds.* The commission shall appoint a treasurer who shall file with it a fidelity bond executed by a surety company authorized to do business in this state, in favor of the commission and the state, in the penal sum of fifty thousand dollars, conditioned upon the faithful performance of his duties and strict accounting of all funds of the commission.

All money received by the commission, or any other state official from the assessment herein levied, shall be paid to the treasurer, deposited in such banks as the commission may designate, and disbursed by order of the commission. None of the provisions of RCW 43.01.050 shall apply to money collected under this chapter.

15.24.160 *Promotional plans — Cooperation of commission.* The commission may employ, designate as agent, act in concert with, and enter into contracts with any person, council, or commission for the purpose of promoting the general welfare of the apple industry and particularly for the purpose of assisting in the sale and distribution of apples in domestic or foreign commerce, and expend its funds or such portion thereof as it may deem necessary or advisable for such purpose and for the purpose of paying its proportionate share of the cost of any program providing direct or indirect assistance to the sale and distribution of apples in domestic or foreign commerce. For such purposes it may employ and pay for legal counsel and contract and pay for other professional services.

15.24.170 *Rules and regulations — Filing — Publication.* Rules, regulations, and orders made by the commission shall be filed with the director and published in a legal newspaper

in the cities of Wenatchee and Yakima within five days after being made, and shall become effective five days after filing and publication.

15.24.180 *Enforcement.* All county and state law enforcement officers and all employees and agents of the department shall enforce this chapter.

15.24.190 *Nonliability of state, members, employees.* The state shall not be liable for the acts of the commission or on its contracts. No member of the commission or any employee or agent thereof shall be liable on its contracts. All liabilities incurred by the commission shall be payable only from the funds collected hereunder.

15.24.200. *Penalties.* Any person who violates or aids in the violation of any provision of this chapter shall be guilty of a gross misdemeanor, and any person who violates or aids in the violation of any rule or regulation of the commission shall be guilty of a misdemeanor.

15.24.210 *Prosecutions.* Any prosecution brought under this chapter may be instituted in any county in which the defendant or any defendant resides, or in which the violation was committed, or in which the defendant or any defendant has his principal place of business.

The superior courts are hereby vested with jurisdiction to enforce the provisions of this chapter and the rules and regulations of the commission issued hereunder, and to prevent and restrain violations thereof.

15.24.900 *Purpose of chapter.* This chapter is passed:

(1) In the exercise of the police power of the state to protect the public health, to prevent fraudulent practices, to promote the welfare of the state, and to stabilize and protect the apple industry of the state;

(2) Because the apple crop grown in Washington comprises one of the major agricultural crops of Washington, and that therefore the business of selling and distributing such crop and the expanding and protection of its market is of public interest;

(3) Because it is necessary and expedient to enhance the reputation of Washington apples in domestic and foreign markets;

(4) Because it is necessary to discover the health giving qualities and food and dietetic value of Washington apples, and to spread that knowledge throughout the world in order to increase the consumption of Washington apples;

(5) Because Washington grown apples are handicapped by high freight rates in competition with eastern and foreign grown apples in the markets of the world, and this disadvantage can only be overcome by education and advertising;

(6) Because the stabilizing of the apple industry, the enlarging of its markets, and the increasing of the consumption of apples are necessary to assure the payment of taxes to the state and its subdivisions, to alleviate unemployment within the state, and increase wages for agricultural labor;

(7) To disseminate information giving the public full knowledge of the manner of production, the cost and expense thereof, the care taken to produce and sell only apples of the finest quality, the methods and care used in preparing for market, and the methods of sale and distribution to increase the amount secured by the producer therefor, so that they can pay higher wages and pay their taxes, and by such information to reduce the cost of distribution so that the spread between the cost to the consumer and the amount received by the producer will be reduced to the minimum absolutely necessary;

(8) To protect the general public by educating it in reference to the various varieties and grades of Washington apples, the time to use and consume each variety, and the uses to which each variety should be put.

15.24.910 *Liberal construction.* This chapter shall be liberally construed.

15.24.920 *Severability, chapter* 240, *Laws of* 1967.

(Legislative history, collateral references and cross references omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing.)

MEMORANDUM ORDER

(Filed 31 December 1975)

This action seeks to declare unconstitutional and to enjoin North Carolina General Statutes, Section 106-189.1 (1975), a statute of statewide application. On plaintiff's motion, the action was certified as requiring a three-judge panel and such a panel has now been designated. Pending at the time of certification was defendants' motion to dismiss the action for lack of either standing of the plaintiff to bring the action or the necessary jurisdictional amount. Upon defendants' request and with consent of the plaintiff given in open court, the motions were heard by the under-

signed Judge sitting alone. The court is satisfied that decision on the motion does not require consideration by the full three-judge panel. *Gonzalez v. Employees' Credit Union,* 419 U.S. 90 (1974); *Jacobs v. Tawes,* 250 F.2d 611 (4th Cir. 1957).[1]

The statute in question provides in effect that closed containers of apples intended for trade in North Carolina markets shall not bear any agricultural grade designation other than the appropriate grade defined by the United States Department of Agriculture. Violations of the statute may be criminally prosecuted. Plaintiff asserts that the statute infringes certain constitutional rights guaranteed to it as an association and to the individual apple growers whose interests the association seeks to represent. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1343, 2201 and 2202. Jurisdiction was alleged under Section 1343 by the amended

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[1] Because of the number of recent developments in the law relating to stay of the hand of the federal courts in cases involving state criminal prosecutions, inquiry was made at the hearing of counsel whether either the plaintiff or any of the persons it seeks to represent were subject to prosecution under N.C.G.S. § 106-189.1(b), which is the criminal provision of the statute under attack. Plaintiff's counsel indicated that all persons represented by plaintiff were refraining from any activity which might generate a prosecution. Accordingly, the decisions of *Hicks v. Miranda,* 422 U.S. 332 (1975), and *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975), would not appear to require dismissal of the action. However, even if a prosecution is begun which would force reconsideration of abstention under the principles of *Younger v. Harris,* 401 U.S. 37 (1971), it is not clear whether such a motion would require consideration by the three judges. *Compare Idlewild Bon Voyage Liquor Corporation v. Epstein,* 370 U.S. 713 (1962), *with MTM, Inc. v. Baxley,* 420 U.S. 799, 805-807 (1975) (Concurring opinion). *See Steffel v. Thompson,* 415 U.S. 452, 457 n. 7 (1974). *But see Blount v. Mandel,* 400 F. Supp. 1190 (D.Md. 1975).

complaint, filed after the motion to dismiss and by consent, which added a substantive claim under 42 U.S.C. § 1983.

Additional facts necessary for resolution of the current motion are derived mainly from the complaint as amended and the appendices thereto. Counsel for all parties at the hearing indicated that the essential facts of the case are not seriously disputed, but that the controlling issues are ones of law. At any rate, for purposes of initially determining standing, the allegations of a complaint, especially where verified, are taken as true. *Warth v. Seldin,* 422 U.S. 490, 501-502 (1975). And while plaintiff bears the burden of sustaining the court's jurisdiction by demonstrating the necessary amount in controversy, the burden is met unless it appears to a legal certainty that the claim is less than the jurisdictional amount. *Jones v. Landry,* 387 F.2d 102 (5th Cir. 1967).

Plaintiff Washington State Apple Advertising Commission is an agency and corporate body created by legislative act of the State of Washington. Rev. Code of Wash., Ch. 15.24 (1967) (hereinafter referred to as "Code"). It has the power to sue and be sued (defendants concede the Commission's capacity to sue), *Code* § .070(8). Its officers are actual growers or producers of apples grown in Washington, and are elected by district by other growers and dealers. *Code* §§ .030, .040. The Commission is charged with the responsibility to ". . . do all things necessary to effectuate the purposes of this chapter." *Code* § .070(2). Although there are eight expressed purposes given for the creation of the Commission, all of which have some relation to the case, there are two such purposes which are of interest sufficient to warrant quotation:

> "This chapter is passed:
>
> . . . "(7) To disseminate information giving the public full knowledge of the manner of production, the cost and expense thereof, the care taken to produce and sell

only apples of the finest quality, the methods and care used in preparing for market, and the methods of sale and distribution to increase the amount secured by the producer therefor, so that they can pay higher wages and pay their taxes, and by such information to reduce the cost of distribution so that the spread between the cost to the consumer and the amount received by the producer will be reduced to the minimum absolutely necessary;

"(8) To protect the general public by educating it in reference to the various varieties and grades of Washington apples, the time to use and consume each variety, and the uses to which each variety should be put." *Code* § .900(7)(8).

The Commission is not a voluntary membership organization as such, but is financed by mandatory assessments levied on all apples produced in the state. *Code* § .100.

The grade and inspection systems referred to in the above-quoted sections are in addition to grading and inspection systems established by the United States Department of Agriculture. That is, the Washington State Department of Agriculture maintains its own grading and inspection system which is separate and apart from the United States system, although the two programs are apparently comprehensive and jointly administered. Plaintiff alleges that the Washington State grade is superior to the United States grade and enjoys a favorable recognition in the apple trade which gives Washington apples a distinct competitive advantage. However, under the statute here under attack, N.C.G.S. § 106-189.1, Washington State grade cannot appear on closed containers of apples shipped into North Carolina.

The apple industry of the State of Washington is substantial, and according to the complaint, in excess of $1,250,-000.00 worth of Washington-grown apples were shipped,

either directly or indirectly, into North Carolina during the crop year 1974. The plaintiff during that crop year spent over $25,000.00 in North Carolina for advertising and trade promotion. According to legislative scheme, the amount of assessments flowing to the plaintiff annually depends on the total production by Washington apple growers during the crop year. For 1974, these assessments totaled almost two million dollars.

Plaintiff alleges that the prohibition of marking Washington State grades on closed containers has decreased the flow of Washington apples to North Carolina, and as to those still shipped into the state, such shipping has been at the expense of First Amendment rights of both the Association and the individual growers and shippers and in restraint of free-flowing interstate commerce. It is further alleged that certain sums of money have been expended to eradicate Washington State grade designations from pre-built containers in order to comply with North Carolina law.

On the basis of the above facts accepted only for purposes of defendants' motion to dismiss, the court holds that the plaintiff Association has standing to assert all the claims presented in the complaint, both those interests clearly belonging to the Association itself and those belonging to the various individual growers and producers of the State of Washington. The court further holds that there exists the necessary amount in controversy. Accordingly, the defendants' motion to dismiss must be denied and the case must be heard on the merits before the three-judge panel.

The developments of the law of standing were fully treated in Justice Powell's opinion writing for the majority in *Warth v. Seldin, supra,* at 498-510. There would be no purpose served by repeating the statements contained in Parts II, III and IV of that opinion; however, Part V is of particular significance since it relates to standing of associations to assert constitutional claims. *Id.* at 510-517. Pro-

vided the "case or controversy" requirement is met, *U.S. Const.*, Art. III § 2, as it clearly is here, an association may have standing either solely as representative of its members or as an association asserting its own rights, in which posture it may additionally assert the rights of its members so long as the claims relate to those matters fundamental to the membership of the individuals. *Id.* at 511. If joinder of each individual member is not necessary to the fair adjudication of the controversy, then the association alone in its representative capacity may sue as long as any individual would have a justiciable controversy if brought in his own name. *Id.* Essentially, the question of standing focuses on the inquiry whether the putative plaintiff would directly benefit from any affirmative relief ordered to remedy the wrongs asserted in the complaint.

The court is persuaded that *W'arth v. Seldin, supra,* gives plaintiff a clear right to bring the current action in both its individual and representative capacities. The Association asserts clear independent injury of at least two types. First, to fail to challenge the ability to freely advertise on closed containers the Washington State grade would be in derogation of its statutory duty. *Code* §§ .070(2), .900(7) (8). Further, if the loss of established trade advantage, by loss of the right to advertise state grades, results in a reduced market for Washington State apples, thereby decreasing annual production, the assessments paid to the Association decrease accordingly.

Defendants strenuously argue that the Association cannot assert any rights in its representative capacity. If this position were maintained, perhaps the scope of the controversy would be limited. However, the position is untenable. Primarily, defendants rely on the fact that plaintiff is not a voluntary membership organization and, therefore, does not enjoy the benefit of prior cases recognizing associational standing. While this factual distinction does exist, it has

no legal significance. Not only was the plaintiff established for the very purposes of protecting the financial integrity of the individuals, thereby creating a statutory nexus between plaintiff and the individuals, but further any affirmative relief ordered to protect the asserted rights of the individuals would result in a direct and tangible benefit to the plaintiff as well. Accordingly, there is an assurance of the quality of adversary presentation called for by the "prudential" standing requirements. *W'arth v. Seldin, supra.*

A resolution of the standing issue in favor of the Association in both its capacities compels a decision in its favor on the jurisdictional amount requirement.[2] It does not appear beyond a legal certainty that less than $10,000, exclusive of interest and costs, is involved. Although no damages are sought, plaintiff seeks injunctive and declaratory relief to protect rights which in "good faith" are claimed to be worth in excess of the minimum jurisdictional amount. A failure to issue an injunction could well result in economic loss in excess of this amount. This possibility is all that is required. *Jones v. Landry, supra.*

Again, it is stated that the facts controlling defendants' motion to dismiss are accepted only for purposes of resolving that motion.

In sum, it is now

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[2] Of course, plaintiff in its amended complaint asserts a cause of action under 42 U.S.C. § 1983. Its jurisdictional counterpart, 28 U.S.C. § 1343, requires no minimum jurisdictional amount. However, defendants challenge on standing grounds the right of the Association to sue as a "person" within the protection of the statute. Such a motion suggests a possible merits determination which would be appropriately resolved by the full panel. *Hagans v. Lavine,* 415 U.S. 528 (1974). The issue is somewhat different than that when the governmental corporation is the defendant. *See, e.g., City of Kenosha, Wisconsin v. Bruno,* 421 U.S. 507 (1973).

ORDERED that:

1. Defendants' motion to dismiss is denied, and an answer shall be timely filed;

2. The motion for a preliminary injunction will be heard before the three-judge panel at 9:40 a.m. on February 6, 1976, in Courtroom No. 1, Seventh Floor, Federal Building, Raleigh, North Carolina.

3. Plaintiff shall have to and including January 20, 1976 to file its brief and supporting documents in favor of its motion;

4. Defendants shall have until February 2, 1976 to file opposing briefs and documents.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

December 30, 1975.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

ANSWER

(Filed 13 January 1976)

Defendants answering the Complaint of the plaintiff, say:

ANSWER TO FIRST CAUSE OF ACTION

1, 2, and 3. The allegations contained in paragraphs 1, 2, and 3 are denied insofar as they allege that the plaintiff has met the jurisdictional requirements for bringing this action and that N. C. G.S. 106-189.1 contravenes any right, constitutional or otherwise, which the plaintiff or the apple growers of Washington State may possess.

4. It is admitted that the plaintiff was created by the Washington Legislature. Defendants are without knowledge as to what specific functions it actually performs.

5. Defendants are without knowledge as to the matters alleged in paragraph 5 and therefore deny them.

6 and 7. The allegations contained in paragraphs 6 and 7 are admitted.

8. Defendants are without knowledge as to the accuracy of the allegations contained in paragraph 8 and therefore deny them. It is admitted, however, that the State of Washington is a substantial apple producing State and that Washington grown apples are regularly shipped into the State of North Carolina.

9. The allegations contained in paragraph 9 are denied except that it is admitted that the apples shipped into North Carolina in closed containers are required to show the U. S. grade.

10, 11 and 12. The allegations contained in paragraphs 10, 11 and 12 are denied.

13. The allegations contained in paragraph 13 are denied except that it is admitted that the defendants have maintained that they would enforce the laws of the State of North Carolina.

14, 15, 16, 17, 18 and 19. The allegations contained in paragraphs 14, 15, 16, 17, 18 and 19 are denied.

ANSWER TO SECOND CAUSE OF ACTION

20. Defendants answer plaintiff's allegations contained in paragraph 20 (which reallege paragraphs 1 through 18 of plaintiff's First Cause of Action by incorporating by reference paragraphs 1 through 18 of their Answer to First Cause of Action.

21. The allegations contained in paragraph 21 of the Complaint are denied.

WHEREFORE, the defendants pray:

1. That plaintiff's request for an injunction to enjoin enforcement of N. C. G.S. 106-189.1 be denied;

2. That the Court find and declare that N. C. G.S. 106-189.1 is a valid and constitutional statute enacted pursuant to the police power of the State of North Carolina.

3. That the defendants have and recover the cost of court and such other relief as the Court shall deem just and equitable.

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(Certificate of service omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF C. W. SCHULKE
IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY RESTRAINING ORDER

(Filed 26 January 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

1. I am Director of Marketing of the Wenatchee-Okanogan Cooperative Federation, known as "Wenoka Sales", and as such direct the sales of approximately 4,-000,000 packed boxes of Washington apples annually. Wenoka Sales consists of eight member cooperative units, each of which is composed of individual apple growers and has its own apple packing and storage facilities, and represents approximately 11-12% of the entire annual crop of Washington apples shipped fresh in closed containers. Wenoka Sales is not only the largest single marketing agency in the State of Washington for Washington State fresh apples sold in closed containers, but is the largest such marketing agency for fresh apples in the United States.

2. In addition to my position of Director of Marketing of Wenoka Sales, I am a former Chairman of the Grade and Pack Committee of the Washington State Horticultural Association, which committee is charged with the responsibility of developing grade standards for Washington State

apples and recommending promulgation to the industry at large and the Director of Agriculture of the State of Washington. I also own a producing apple orchard in the State of Washington.

3. The industry practice in the State of Washington is to order carton shipping containers of one bushel capacity each for packed apples well in advance of the harvesting season, preprinted with the appropriate variety and grade. In order to ship packed apples in closed containers bearing the Washington State grade into the State of North Carolina in compliance with the North Carolina statute, it has been necessary to obliterate the Washington State grade and substitute the comparable U. S. grade. The cost of obliteration and substitution is between five cents and fifteen cents per box, depending on the number of obliterations and re-marking required per box and the amount of handling thereof. Because of this inconvenience and expense and the resultant mutilated appearance of the apple container, Washington State growers in increasing numbers have been forced to abandon preprinting the apple container with the Washington State grade and are instead either preprinting it with the U. S. grade or are foregoing preprinting and resorting to the more expensive, slower hand stamping of the container with the appropriate U. S. grade if the container is destined for North Carolina.

4. Washington State grade standards have historically required a higher intensity of color for comparable grades and varieties over the U. S. grade standards and said Washington State grade standards in every respect do equal or exceed the comparable standards for U. S. grades.

5. At least three of the eight Wenoka Sales units have refused to sell and ship apples to North Carolina in closed containers bearing the Washington State grade because of the burdensome requirements of the North Carolina statute

requiring obliteration and re-marking. In addition, many purchasers of Washington apples in North Carolina have refused to purchase Washington apples in closed containers bearing the Washington State grade because of the expense and nuisance of obliterating the Washington grade and re-marking the container with the comparable U. S. grade on arrival. In both cases, North Carolina purchasers object to the mutilated appearance of the container after the obliteration and re-marking and resultant lessened market acceptability. Inevitably, the additional cost imposed upon North Carolina wholesale purchasers in being required to obliterate the Washington State grade and re-mark the closed containers with the appropriate U. S. grade must be recovered by them and is passed on as an extra burden to the North Carolina retail consumer.

6. One of the most serious problems caused by the North Carolina statute relates to trans-shipments into North Carolina from surrounding out-of-state regional distribution points to which Washington State apples are shipped. For example, a shipment of one or more cars of Washington State apples is made to a regional distribution center of a chain store, cooperative or other group purchaser, and from that point the shipment is broken into small lots and shipped to various ultimate destinations, including points within North Carolina. Such distribution points include Norfolk, Virginia; Richmond, Virginia; Roanoke, Virginia; Spartanburg, South Carolina; Columbia, South Carolina; and Atlanta, Georgia. When Washington State apples are shipped to these distribution points, there is no way of knowing how many, if any, are destined by the purchaser for ultimate distribution and sale within the State of North Carolina and consequently, Washington State apple growers and shippers do not know on this type of shipment how many, if any, of the closed containers of Washington State apples require remarking or must in the first instance be marked only with a U. S. grade. As a result, the ultimate consignee within

North Carolina must obliterate the Washington State grade from Washington State containers and re-mark them with the appropriate U. S. grade or insist on the containers being marked only with the U. S. grade in the first instance. This further adds to the burden imposed upon North Carolina wholesalers and on the orderly marketing process of Washington State apples in interstate commerce. At least 30% to 40% additional Washington State apples are transshipped in this manner into North Carolina as are sold directly in North Carolina in the first instance.

7. Washington State apples, graded to the specified Washington State standards, have a superior trade acceptance in the markets of the United States over apples graded to the required U. S. Standards, principally because of the requirements for higher density of color under Washington State standards, and as a result thereof, apples graded to Washington State standards bring a higher net return to the Washington State apple growers.

8. In marketing apples in closed containers in North Carolina, as well as other states, the initial sale is made directly to the wholesaler or to the wholesale department of larger retailers such as the chain stores. In either case, before the apples are placed in retail sale channels they are first removed from the closed container and displayed for retail sale loose in display cases and in some instances in transparent bags or on trays with a transparent overwrap. The original closed shipping container, which has been preprinted with variety and grade, does not go into retail sale channels and is not exhibited to the retail consumer. The grade markings thereon are only a meaning to the wholesale purchaser, who is an expert and knowledgeable in the field of wholesale purchasing of apples.

9. The requirements of the North Carolina statute have disrupted the orderly marketing process of Washing-

ton State apples in closed containers bearing the Washington State grade into North Carolina and adjoining states and have placed Washington State apple growers and shippers in the position of being required to do one of the following:

(a) Obliterate the Washington State grade on those containers with such preprinting and re-mark the same with a comparable U. S. grade, thus giving the box a mutilated appearance.

(b) Abandon the use of the Washington State grade and preprint apple containers with only the U. S. grade.

(c) Forego the economies and convenience of preprinting containers with the appropriate grades and instead resort to the expensive, obsolete and slower method of hand marking.

10. North Carolina is the only state in the union and the only place in the world which prohibits the display of the Washington State grade on closed containers of Washington State apples.

C. W. SCHULKE

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 26 January 1976)

(The affidavits of Thomas R. Morris and W. L. Kyle are identical with the exception of the identifying paragraphs

and differences in paragraph 8; also, Mr. Kyle's affidavit includes a paragraph 9, as follows):

THOMAS R. MORRIS, being first duly sworn, deposes and says:

My name is Thomas R. Morris. I am engaged in the purchase and sale of apples as a wholesaler. I have been so engaged for not less than 40 years. My business address is State Farmers Market Street, Columbia, State of South Carolina 20201.

My name is W. L. Kyle. I am engaged in the purchase and sale of apples as a Broker. I have been so engaged for not less than 30 years. My business address is 200 Patterson Avenue Street, Winston-Salem, State of North Carolina 27102.

1. Throughout the years during which I have purchased apples for the conduct of my business, it has been my experience and my personal observation that apples bearing the Washington State grade have a higher degree of consistency, uniformity and dependability than do apples bearing the comparable United States grade. Therefore, I prefer to purchase apples bearing the Washington State grade rather than apples bearing only the United States grade and those apples with the Washington State grade have a superior trade acceptance with me.

2. As I have stated, not only am I a buyer of apples, but I am a seller of apples as well. Over the years, it has been my experience and my personal observation that apples bearing the Washington State grade are more readily marketable by me and have a superior trade acceptance with those to whom I sell than do apples bearing only the United States grade.

3. In the course of my business I have frequent contact with others who are similarly situated in the buying and selling of apples in competition with me and in other areas where we are not in competition. I find from my association and contact with those people in the course of my business that the great majority of them likewise prefer to buy on the basis of the Washington State grade rather than the United States grade and find that the Washington State grade has superior acceptance with their customers than does the United States grade.

4. I am aware of the fact that apples shipped in containers bearing the Washington State grade are inspected by Federal or Washington State inspectors who determine prior to shipment that those apples meet the specifications of the Washington State grade placed on the container. I have found in my experience that apples shipped in containers bearing the Washington State grade do in fact meet the standards of that grade and therefore I rely upon the Washington State grade as placed on the container.

5. It has been my experience that apples purchased by me which are produced outside of the State of Washington and which carry United States grade on their container are not customarily inspected by either Federal or State inspectors prior to shipment to determine whether they do in fact meet the United States grade standard as shown on the container and on numerous occasions I have, therefore, purchased such apples which, in my opinion, did not meet the standards of the United States grade shown on their container. Because of this, when purchasing apples from other states which do not bear the Washington State grade, I rely primarily upon my opinion of the individual shipper rather than the United States grade under which the apples are shipped.

6. As a buyer of apples in closed shipping containers I would not be confused in any way by the container bearing

both a Washington State grade and a U. S. grade. The purchase of apples in closed shipping containers is normally and generally done by wholesale produce brokers and distributors or by the produce buyers for food store chains or groups of independent food stores. In my experience, such buyers are knowledgeable in both the Washington State and U. S. grades and would not be confused by shipping containers bearing both the Washington State and U. S. grades, but on the contrary, would be better informed as to the quality of the apples by knowing the Washington State grade in addition to the United States grade.

7. Apples are not sold at retail to the consuming public in their shipping containers.

Paragraph 8 from Mr. Morris' affidavit:

8. In addition to purchasing Washington State apples for distribution in my immediate business area, I purchase substantial quantities of Washington State apples which are resold in other states, including North Carolina. When I purchase such apples, I do not then know which of them will be resold in North Carolina. Consequently, in all such trans-shipments to North Carolina, the Washington State grade on shipping containers must first be obliterated and a United States grade substituted. This procedure is inconvenient, costly and give the container a mutilated appearance.

Paragraphs 8 and 9 from Mr. Kyle's affidavit:

8. Until several years ago, Washington State apples purchased by me during the years I have been in the business, bore the Washington State grade on the shipping container and only that grade.

9. Since Section 189.1 of chapter 106 of North Carolina General Statutes (G.S. 106-189.1) went into effect one of my major apple shipper from Washington State has re-

fused to ship into North Carolina because of the burden placed upon him. This has caused me as a broker to loose the sale of twenty carloads of Washington apples per year.

This 19th day of January, 1976.

s/ Thomas R. Morris

This 23rd day of January, 1976.

s/ W. L. Kyle

(Jurat omitted in printing)

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 26 January 1976)

(The affidavits of J. L. Morgan and Donald Ford are identical with the exception of the identifying paragraphs as follows):

J. L. MORGAN, being first duly sworn, deposes and says:

My name is J. L. Morgan. I am engaged in the purchase and sale of apples as a Retailer. I have been so engaged for not less than 40 years. My business address is 2014 Fairview Road Street, Raleigh, State of North Carolina 27608.

My name is Donald Ford. I am engaged in the purchase and sale of apples as a wholesaler. I have been so engaged for not less than 30 years. My business address is State Farmer's Market Street, Raleigh, State of North Carolina 27604.

1. Throughout the years during which I have purchased apples for the conduct of my business, it has been my experience and my personal observation that apples bearing the Washington State grade have a higher degree of consistency, uniformity and dependability than do apples bearing the comparable United States grade. Therefore, I prefer to purchase apples bearing the Washington State grade rather than apples bearing only the United States grade and those apples with the Washington State grade have a superior trade acceptance with me.

2. As I have stated, not only am I a buyer of apples, but I am a seller of apples as well. Over the years, it has been my experience and my personal observation that apples bearing the Washington State grade are more readily marketable by me and have a superior trade acceptance with those to whom I sell than do apples bearing only the United States grade.

3. In the course of my business I have frequent contact with others who are similarly situated in the buying and selling of apples in competition with me and in other areas where we are not in competition. I find from my association and contact with those people in the course of my business that the great majority of them likewise prefer to buy on the basis of the Washington State grade rather than the United States grade and find that the Washington State grade has superior acceptance with their customers than does the United States grade.

4. I am aware of the fact that apples shipped in containers bearing the Washington State grade are inspected by

Federal or Washington State inspectors who determine prior to shipment that those apples meet the specifications of the Washington State grade placed on the container. I have found in my experience that apples shipped in containers bearing the Washington State grade do in fact meet the standards of that grade and therefore I rely upon the Washington State grade as placed on the container.

5. As a buyer of apples in closed shippiag containers I would not be confused in any way by the container bearing both a Washington State grade and a U. S. grade. The purchase of apples in closed shipping containers is normally and generally done by wholesale produce brokers and distributors or by the produce buyers for food store chains or groups of independent food stores. In my experience, such buyers are knowledgeable in both the Washington State and U. S. grades and would not be confused by shipping containers bearing both the Washington State and U. S. grades, but on the contrary, would be better informed as to the quality of the apples by knowing the Washington State grade in addition to the U. S. grade.

6. Apples are not sold at retail to the consuming public in their shipping containers.

7. Until several years ago, Washington State apples purchased by me during the years I have been in the business, bore the Washington State grade on the shipping container and only that grade.

This the 22nd day of January, 1976.

s/ Donald Ford

s/ J. L. Morgan

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

(The affidavits of Curtis F. Tarleton and Charles Elks are identical except that the identifying paragraph of the Elks' affidavit identifies him as Assistant Director of the Division of Markets, N. C. Dept. of Agriculture.)

The undersigned, first being duly sworn, deposes and says:

1. That he is Curtis F. Tarleton, Director of the Division of Markets, North Carolina Department of Agriculture, and that he has personal knowledge about the matters contained herein.

2. N. C. Gen. Stat. §106-189.1 was enacted by the General Assembly in 1971 and amended in 1973 to read as follows:

> Apples marked as to grade; penalty. — (a) All apples sold, offered for sale or shipped into this State in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U. S. grade or standard or the marking "unclassified," "not graded" or "grade not determined."
>
> (b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than fifty dollars ($50.00). Each day on which ap-

ples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

3. N. C. Gen. Stat. §106-189.1 is part of Article 17 of the General Statutes, which Article is entitled "Marketing and Branding Farm Products". The purpose of the Article is set forth in N. C. Gen. Stat. §106-185 as follows:

> Establishment of standard packages, etc., authorized. — The purpose of this Article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages and State brands for farm and horticultural crops and animal products. The term "farm products" as used hereafter in this Article shall be construed to mean any or all of the crops or products named above in this section.

4. Enactment of N. C. Gen. Stat. §106-189.1 was actively supported by the North Carolina Department of Agriculture.

5. N. C. Gen. Stat. §106-189.1 promotes uniformity in the grading of apples sold, offered for sale, or shipped into North Carolina and helps to eliminate confusion among the buyers and sellers of apples.

6. Prior to the enactment of N. C. Gen. Stat. §106-189.1, apples were being shipped into North Carolina and sold with the same indicative grade terms (E.g., Extra Fancy, Fancy, etc.) being used on apples of entirely different quality.

7. A large number of states ship apples into North Carolina. The following states ship apples into North Carolina:

Delaware
Georgia

Idaho
Maryland
Michigan
New Jersey
New Hampshire
New York
Oregon
South Carolina
Virginia
Washington
West Virginia

8. Of the states which ship apples into North Carolina, the following have state apple grading standards:

Idaho
Michigan
New York
Oregon
Virginia
Washington
West Virginia

9. There are a number of additional states which have state apple grading standards which are not currently shipping apples into North Carolina on a regular basis. They include:

Colorado
Illinois
Missouri
New Jersey
Ohio
Utah

10. There is no uniformity among the apple grading standards of the various states which have state grading standards.

11. At the time N. C. Gen. Stat. §106-189.1 was enacted, Washington State grades were not equal to U. S. Grades even though the same indicative terms (E.g., Extra Fancy, Fancy, etc.) were utilized.

12. Washington State apple grading standards were revised and made equal to the U. S. grading standards effective September 1, 1974. The affiant is informed and believes, and therefore alleges upon information and belief, that the Washington standards were changed in anticipation of plaintiff's court challenge to N. C. Gen. Stat. 106-189.1.

13. The Washington State apple grading standards may be revised at any time by the Washington State Department of Agriculture without the necessity of legislative action.

14. Less than 1% of the annual Washington State apple crop is shipped into North Carolina.

15. The N. C. Department of Agriculture and other State agencies do not attempt to interfere in any manner whatsoever with the advertising of Washington-grown apples within the State of North Carolina.

16. Affiant states upon information and belief that the use by Washington apple growers and shippers of preprinted shipping containers with the grade preprinted represents only a small percentage of the total number of shipping containers used by such shippers and growers.

17. Affiant knows of no one refusing to ship apples to North Carolina because of N. C. Gen. Stat. 106-189.1 and knows of no one refusing to buy Washington-grown apples, so long as they were marked in accordance with the law.

18. Prior to enactment of N. C. Gen. Stat. §106-189.1, many substandard apples were shipped into North

Carolina and sold with state grade markings which indicated they were of a better grade than was actually the case. These included apples marked with Washington State grades.

19. The quality of apples shipped into North Carolina has improved due to the enforcement of N. C. Gen. Stat. 106-189.1.

20. That N. C. Gen. Stat. §106-189.1 does not prevent a North Carolina buyer from purchasing apples which have been graded according to Washington standards, if he desires to do so. A North Carolina buyer can request that the apples be graded in Washington pursuant to Washington standards. Such apples would then be shipped into North Carolina in containers showing only the applicable U. S. Grade.

21. The use of state grading standards in grading fruit and produce other than apples is not a common practice. Of the various fruits and produce shipped into North Carolina, only Oregon pears are graded according to a state grade. The great majority of fruits and products shipped into North Carolina are graded by U. S. grading standards.

22. The N. C. Gen. Stat. §106-189.1 applies only to apples in closed containers. Apples in open containers are accessible to the purchaser and can be easily inspected by the purchaser to insure that he is getting the quality of apple he desires.

23. That prior to enactment of N. C. Gen. Stat. 106-189.1 the majority of apple shipping containers shipped into North Carolina from Washington State were handstamped with the applicable grade.

24. That at the present time, most apple shipping containers arriving in North Carolina from the State of Washington are handstamped with the variety and count, even when the grade is pre-printed on the carton.

25. That a substantial percentage of the apples shipped into North Carolina from Washington State are bagged in plastic bags which are shipped in closed shipping containers. Such apples are routinely offered for sale to the consuming public in the plastic bags. The quantity of apples shipped in this manner appears to be on the increase.

26. Federal law prohibits the shipment in interstate commerce, of improperly branded fruit and produce. Violations which are discovered by North Carolina inspectors are reported to the U. S. Department of Agriculture for appropriate action.

Dated: 29 January, 1976.

CURTIS F. TARLETON

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

The undersigned, first being duly sworn, deposes and says:

1. He is Lynwood Davenport, Federal Supervisor, Fresh Fruit Inspection, Agricultural Marketing Service, United States Department of Agriculture, and that he has personal knowledge of the matters contained herein.

2. In January of 1972, United States Secretary of Agriculture Earl L. Butz established a special team to study apple marketing problems and to recommend action that would benefit the apple industry. The study team consulted extensively with members of the apple industry and experts in State and Federal Governments in making its study. The team's report was submitted to Secretary Butz in August of 1972. The section of the report dealing with Grades and Standards is appended hereto and made a part hereof.

3. The report notes that:

"At present, 13 states have their own grades and standards for apples (footnote omitted), but only the State of Washington uses its grades extensively. The State grades are similar to USDA grades (footnotes omitted), *but there are variations in certain requirements, i.e., color, shape and russetting, which lead to confusion in trading. Elimination of State grades and adoption of U. S. grades would lessen confusion in trading at the wholesale and retail levels.*" (emphasis added).

4. The report made a number of recommendations. Of particular importance is recommendation number 4:

"State Grades. — There is a need for legislation in 13 states that would eliminate State grades for apples to lessen confusion in trading. (North Carolina amended its Apple Branding Law, effective July 1, 1972, to require all apples sold or offered for sale in closed containers in the State to bear on the container, bag, or other receptacle, the applicable U. S. grade or be marked "Unclassified," "Not Graded," or "Grade Not Determined." State grades do not comply with their branding regulations. Other states should be encouraged to have similar laws.)"

5. The United States Department of Agriculture has proposed establishing a uniform grade nomenclature for United States grades of fresh fruits, vegetables, nuts and other special products. Notice of the proposal was published in the Federal Register, Vol. 40, No. 194, a copy of which is attached hereto and made a p- -t hereof.

6. In its statement of considerations leading to the proposal, the U. S. Department of Agriculture noted the following:

(a) In January 1975 the General Accounting Office recommended to Congress that the Secretary of Agriculture "revise existing regulations to make grade designations more uniform and easier for consumers and industry to understand."

(b) The National Association of State Department of Agriculture has urged the Department to develop uniform grade names.

(c) Members of the 94th Congress have introduced legislation calling for uniform grade nomenclature.

(d) Trade journals have published articles pointing up the lack of uniform nomenciature.

7. The Department further notes that at present "there are 152 grade standards covering 82 fresh fruits and vegetables" and that there are "at least four different terms to describe the top grade for" those 82 fresh fruits, vegetables, nuts and other special products.

8. If the proposal is adopted, only the following grade names will be used:

U. S. Fancy, U. S. No. 1, U. S. No. 2, and U. S. No. 3.

Dated: 28 January, 1976.

LYNWOOD DAVENPORT

Lynwood Davenport

(Jurat omitted in printing)

[Attachment 1]

GRADES AND STANDARDS

Problem

The U. S. Standards for Grades of Apples were first promulgated in 1924. Since then, the standards have been revised or amended many times at the request of industry to reflect changes in the industry. Many people in the industry maintain that the standards should be further revised to better serve the needs of industry and reflect levels of quality desired by consumers.

Discussion

The U. S. Standards for Grades of Apples are promulgated by the Fruit and Vegetable Division of the Agricultural Marketing Service (AMS), specifically the Fresh Products Standardization and Inspection Branch. This branch is divided into two sections: (a) Inspection and (b) Standardization. The Inspection Section provides official inspection and grading services to shippers, processors, sellers, buyers (including other Government agencies), and other financially interested parties on a fee basis. Use of this service is voluntary (unless made mandatory by some other program or contract) and is available upon request.

The Standardization Section is responsible for developing standards and procedures for their application to aid growers and other segments of the fresh product industry in marketing their product. The standards provide a yardstick for measuring quality which forms a basis for satisfactory trading.

Most apple packers use the standards and inspection for quality control in packing to meet wholesale buyer requirements and to enable appropriate labeling for benefit of the consumer. At present, 13 States have their own grades and standards for apples, but only the State of Washington uses its grades extensively. The State grades are similar to USDA grades, but there are variations in certain requirements, i.e., color, shape, and russeting, which lead to confusion in trading. Elimination of State grades and adoption of U. S. grades would lessen confusion in trading at wholesale and retail levels.

Many people at the regional meetings commented that the U. S. Standards for Grades of Apples should be revised to:

1. Make condition part of grade;
2. Lower color requirements; and
3. Eliminate the U. S. No. 1 grade.

What would be the benefit of making condition part of grade? The U. S. Standards for Grades of Apples, along with the pear standards, are different in one respect from other (fresh fruit and vegetable) U. S. grade standards. In the apple and pear standards, decay and other factors developing after storage or transit are considered as affecting condition and not the grade (quality). (The Inspection Service general definition of quality and condition as they apply to fresh fruits and vegetables are as follows:

1. Quality — The inherent properties of a product which determine its relative degree of excellence.

2. Condition — The relative degree of soundness or preservation of a product and includes, but is not necessarily limited to, its firmness, decay, freezing or mechanical injury, shriveling, flabbiness, or any other factor which affects its merchantability.)

Factors of deterioration are not handled this way in grade standards for other products. For example, in the U. S. Standards for Peaches, decay, bruising, softness, and other factors subject to change are scored against grade along with permanent defects (those not subject to change) to determine the grade of the lot. At shipping point, a lot of peaches containing more than 1-percent decay but with permanent defects within tolerance would fail to grade U. S. No. 1 because the 1-percent tolerance for decay is exceeded. The lot would be certified as failing to grade U. S. No. 1 because of defects in excess of the tolerance or as containing a certain percentage of U. S. No. 1 quality, together with the percentage of decay or other serious condition defects. En route or at destination such a lot could have an additional 2-percent tolerance for decay; but if the decay tolerance were exceeded, the lot would be reported out of grade and certified as follows:

"Meets quality requirements but fails to grade U. S. No. 1 account of condition."

This procedure is followed in the case of grapes, cantaloups, onions, potatoes, lettuce, and all other fruits and vegetables for which there are grade standards, except apples and pears. Some of the standards provide increased tolerances en route or at destination; others do not.

Under the present apple standards, a lot of freshly packed apples containing decay or other condition defects in excess of the specified tolerances would fail to meet grade and would be certified out of grade or as containing a per-

centage of a given grade, e.g., 85 percent No. 1 quality. However, when apples are inspected after storage, en route, or at destination, and the lot contains excessive decay or other condition defects, it would be reported as meeting the specified grade, e.g., U. S. Extra Fancy, decay and scald being factors of condition. This would be the case even though the lot may contain *100* percent decay or other condition defects.

Some members of the industry maintain that condition should not be made part of grade until condition factors can be determined by objective methods. The truth of the matter is that all factors of condition scorable as defects, including overripe fruit, are readily detected and evaluated subjectively (with a high degree of accuracy) by the Inspection Service. If the standards were revised today, making condition part of grade, the Inspection Service could accurately interpret all condition defects. Presently, condition is part of grade in Canada (apple standards) and the system is working well.

Firmness is the only factor of condition which cannot be accurately determined by subjective means. There are five stages of firmness or ripeness: Hard, firm, firm ripe, ripe, and overripe. Overripe is considered a condition defect in the apple standards and the exact percentage found in a lot by the inspector is reported on the inspection certificate. The other degrees of firmness are not condition defects but are reported on the certificate in general terms to provide the reader with a picture of firmness (ripeness) of the lot. It is difficult, if not impossible, for inspectors to accurately separate degrees of firmness (hard to ripe) using present methods of determination. Accurate objective methods and indices must be developed.

If U. S. grade standards were revised to include condition as part of grade, the apples offered for sale at retail

should improve in condition. State departments of agriculture could also play a major role in improving condition of apples at retail levels by increased surveillance and enforcement of State branding laws. This means that containers or consumer packages marked with a grade would have to meet that grade or the handler would be in violation of the law and would be subject to a fine.

What would be the benefit of lowering color requirements in the grade standards?

Color requirements in the U. S. Standards for Grades of Apples specify shades of red color permitted in the grades and the minimum percentage of surface area that must be covered with it * * * It was mentioned at the regional meetings that emphasis on red color is detrimental to improving condition of fruit since growers tend to leave fruit on the trees longer to obtain maximum color; this practice often results in overripe fruit.

Relaxing color requirements for the grades by 10 percent would mean a higher percentage packout of Extra Fancy and Fancy apples which are likely to be in better condition. The fresh apple grower could realize more money for his crop if buyers would accept apples with less red color. Relaxation of color requirements would be especially helpful to growers in California, North Carolina, South Carolina, and Georgia, where climatic conditions make it difficult to obtain Extra Fancy and Fancy color.

Should the U. S. No. 1 grade be eliminated?

The U. S. No. 1 grade is the primary trading grade for many fresh fruits and vegetables but not apples. U. S. Fancy is the primary apple trading grade, although U. S. No. 1 apples are marketed extensively in some cities.

The basic differences between U. S. No. 1 and higher grades is color, russeting, and invisible water core. U. S. No. 1 apples may have less red color than higher grades and more russeting; visible water core is not scorable against U. S. No. 1, but is against higher grades.

Many industry people contend the No. 1 grade should be eliminated because the grower is fortunate to break even selling this quality fruit through regular fresh market channels. Roadside stands are a good and profitable outlet for No. 1 apples but less than 5 percent of commercial production is merchandised this way.

U. S. No. 1 apples are a good buy for many consumers who desire apples with less color and cosmetic appeal. If this grade were eliminated from the standards, two grades would be eliminated — U. S. No. 1 and Combination U. S. Fancy and U. S. No. 1. The best way to determine whether this change and other changes mentioned earlier should be adopted is for AMS to publish a draft for discussion to determine the desirability of revising the apple standards. This draft would receive full distribution to the industry for their overall views and comments.

* * *

What changes can be made in the apple grade standards that will benefit growers and consumers?

Solutions

1. *Immediate Action.* — Making condition part of grade should improve the condition of apples at retail and possibly increase demand through better satisfied consumers.

2. *Immediate Action.* — Reducing color requirements in apple standards for red varieties 10 percent should improve condition of fruit from the growing area on through

to the market. It would be easier for growers to meet the U. S. Extra Fancy and Fancy grades.

3. *Later Action.* — Develop grade requirements that emphasize degrees of quality based on external appearance (as in present standards) and eating quality. Research is needed to correlate eating quality to firmness, soluble solids, and appearance.

4. *Later Action.* — Require apples to be no further advanced than firm ripe at point of origin. This is currently being done by Canada. It would definitely improve fruit condition, and could be implemented when accurate methods of determining firmness are developed.

Recommendations

1. *Quality — U. S. Grades and Standards.* — There is a need to determine the desirability of revising the U. S. Apple Standards to better control quality. These standards are the responsibility of the Agricultural Marketing Service (AMS) of the USDA in cooperation with the apple industry. The team recommends that changes be made in the following areas:

a. Make condition part of grade by deleting paragraph 51.310 in the standards. With this change, decay, breakdown, and other deterioration developing on apples during storage or in transit would be scored against the grade, as is done for most other fresh produce. However, tolerances might be increased at destination. Concerning firmness, only overripe fruit would be scored against grade. This should improve the condition of apples offered for sale at retail and increase demand.

b. Eliminate the U. S. No. 1 grade and other lower grades that are rarely used. (Current standards contain nine grades, three of which are combination grades.)

c. Lower color requirements for red and red-striped varieties by 10 percent for Extra Fancy and Fancy grades.

d. Make additional changes to update and clarify the standards.

A draft with proposed changes would be prepared and would receive industry-wide distribution. All interested parties would be encouraged to submit written views and comments. Views and comments would be evaluated and desirable changes would be published under notice of proposed rulemaking in the Federal Register for public review and comments.

2. *CA Condition Standards.* — The USDA (AMS) in cooperation with industry should determine the desirability for establishing minimum national CA standards for condition.

3. *Maturity and Ripeness Indices.* — Objective methods and indices for determining immaturity and ripeness for commercially important varieties need to be developed. This type of research is needed immediately on a regional basis. (ARS, AMS, and State experiment stations.)

When accurate methods and indices are devised for measuring maturity and ripeness, U. S. Standards for Grades of Apples should be revised. This will require fruit at shipping point to be mature but no more advanced in firmness (ripeness) than firm ripe. (See paragraph 51.323 of current Standards.) Canadian standards now call for firm and firm-ripe maturity at time of shipment—riper fruit is classed as "local maturity" and is sold to local or nearby markets.

4. *State Grades.* — There is a need for legislation in 13 States that would eliminate State grades for apples to lessen confusion in trading. (North Carolina amended its Apple Branding Law, effective July 1, 1972, to require all

apples sold or offered for sale in closed containers in the State to bear on the container, bag, or other receptable, the applicable U. S. grade or be marked "Unclassified," "Not Graded," or "Grade Not Determined." State grades do not comply with their branding regulations. Other States should be encouraged to have similar laws.)

5. *State Branding Laws.* — State departments of agriculture should increase surveillance and enforcement of State branding laws, at the retail level, to keep off-quality produce from being sold.

6. *Processing Grades and Standards.* — The USDA (AMS), in cooperation with industry, should develop improved quality standards for apples for processing and processed apples, in particular apple juice.

(Footnotes omitted in printing)

[Attachment 2]

Proposed Rules

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[7 CFR Part 51]

FRESH FRUIT, VEGETABLES, NUTS AND OTHER SPECIAL PRODUCTS[1]

Proposed Grade Standards

Notice is hereby given that the United States Department of Agriculture is considering the issuance of policy on establishing uniform grade nomenclature for United States standards for grades of fresh fruits, vegetables, nuts and other special products (7 CFR § 51.100) pursuant to the Agricultural Marketing Act of 1946 (60 Stat. 1087, as amended; 7 U.S.C. 1621-1627), which provides for the issuance of official U. S. grades to designate different levels of quality for the voluntary use of producers, buyers and consumers. Official grading services are also provided under this act upon request of any financially interested party and upon payment of a fee to cover the cost of such services.

All persons who desire to submit written data, views or arguments for consideration in connection with the proposal should file the same in duplicate, not later than February 15, 1976, with the Hearing Clerk, U. S. Department of Agriculture, Room 112, Administration Building, Washington, D.C. 20250, where they will be available for public review during official hours of business (7 CFR § 1.27(b)).

[1] Packing of the product in conformity with the requirements of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug and Cosmetic Act or with applicable State laws and regulations.

Statement of considerations leading to the proposed issuance of policy on uniform grade nomenclature. For a number of years there has been interest and concern on the part of industry groups, some legislators, consumers and the Department in the variations in grade names used in the grade standards for fresh fruits and vegetables. In January 1975 the General Accounting Office recommended to Congress that the Secretary of Agriculture "revise existing regulations to make grade designations more uniform and easier for consumers and industry to understand." The National Association of State Departments of Agriculture has urged the Department to develop uniform grade names. Members of the 94th Congress have introduced legislation calling for uniform grade nomenclature for all foods and for mandatory grading and grade labeling. There have been several articles published in trade journals critical of grade standards, pointing up the lack of uniform nomenclature and the difficulties consumers encounter when they attempt to understand grade names on fresh fruits and vegetables.

The first fruit and vegetable grade standards established were for potatoes in 1917. Since then standards have been established for many commodities. At present there are 152 grade standards covering 82 different fresh fruits and vegetables. These grade standards are voluntary and were developed in consultation with representatives of producers, receivers and to some extent consumers, following three basic principles: (1) There must be a need for the standards; (2) There must be interest and support for the use of the standards; and (3) The standards must be practical to use. The lack of uniformity in the grade terminology has not always been a problem to those who used the standards.

In developing grade standards for a commodity the full range of quality produced is considered. The number of

grades provided depends to a large extent on the number of distinct gradations of quality that the industry makes and which is usually governed by the relative value of the product. When the Department first developed wholesale grade standards, U. S. No. 1 was the highest grade. It covered the majority of a crop produced and meant the product was of good quality. U. S. No. 2 represented the remainder of the crop that was worth packing for sale under marketing conditions. As work on the standards progressed, it was recognized that for some commodities two grades were not enough. So premium grades were added; the same grade nomenclature, however, was not used for all the various commodities.

In the present standards there are at least four different terms to describe the top grade for 82 fresh fruits, vegetables, nuts and other special products. U. S. Extra No. 1 (potatoes), U. S. Extra Fancy (apples), U. S. Fancy (oranges and grapefruit), U. S. No. 1 (onions) are a few examples. These are the commodities that are most likely to be grade labeled in retail stores. The situation becomes more complex when discussing second and third grades because U. S. No. 1 for example is the second grade for potatoes and the third grade for apples. Some standards provide an intermediate grade between U. S. No. 1 and U. S. No. 2 to describe quality not up to U. S. No. 1 requirements, but superior to U. S. No. 2 quality. The terms "U. S. Commercial" and "U. S. Combination" were adopted to describe this quality. "U. S. No. 3" designation is used only in a few standards to accommodate a lower quality for highly specialized products which lend themselves to separations into many quality gradations.

As the grade standards were developed or revised over the years, it was usually members of the particular commodity industry concerned, like the potato growers or shippers and the apple packers, who had most influence on what grade

terminology was selected. There are probably good reasons why the g ade terminology evolved that way. But as marketing becomes more complex it is much more important to have a system of simplified nomenclature that everyone can easily understand and use.

It is the industry's responsibility as well as the Department's to help consumers get the quality they desire. A simplified uniform grade nomenclature that consumers and everyone in the marketing system could understand would certainly help consumers get the quality they want.

In the past year, members of the Fruit and Vegetable Division of the Department have discussed with various people in the produce industry a proposal to establish uniform grade nomenclature for fresh fruits and vegetables. The proposal would establish the Department's policy to provide that when new U. S. grade standards for fresh fruits and vegetables are issued, or when existing grade standards are revised or amended, only the following grade names shall be used: U. S. Fancy, U. S. No. 1, U. S. No. 2 and U. S. No. 3.

The proposed new subpart shall read as follows:

Subpart — United States Standards for Grades of Fresh Fru ts, Vegetables, Nuts and Other Special Products

UNIFORM GRADE NOMENCLATURE

§ 51.100 *Uniform grade nomenclature.*

When new U. S. standards for grades of fresh fruits, vegetables, nuts and other special products are issued, or when existing grade standards are revised or amended, the following grade nomenclature shall be used.

Grade Name	*Definition*
U. S. Fancy	Premium quality; covers only the top quality range produced.
U. S. No. 1	The chief trading grade: represents good average quality that is practical to pack under commercial conditions; covers the bulk of the quality range produced.
U. S. No. 2	Intermediate quality between U. S. No. 1 and U. S. No. 3; noticeably superior to U. S. No. 3.
U. S. No. 3	The lowest merchantable quality practical to pack under normal conditions.

(Secs. 203, 205, 60 Stat. 1087, as amended, 1690 as amended; 7 U.S.C. 1622, 1624)

Dated: October 1, 1975.

Donald E. Wilkinson,

Administrator.

[FR Doc. 75—26726 Filed 10-3-75; 8:45 a.m.]

FEDERAL REGISTER, VOL. 40, NO. 194 — MONDAY, OCTOBER 6, 1975

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF HAROLD COZART

(Filed 2 February 1976)

HAROLD COZART, being first duly sworn on oath deposes and says:

1. That I am the General Manager for Blue Chelan, Inc., a co-operative producer and shipper of Washington grown apples. Blue Chelan account for approximately 2½% of all State of Washington apples shipped in interstate commerce.

2. After the adoption of G. S. 106-189.1, by the State of North Carolina, Blue Chelan was forced to obliterate the Washington State grade on shipments of apples which might terminate in or be diverted to North Carolina. The cost of this obliteration and special handling was prohibitive. Consequently, because Blue Chelan wanted to continue to sell apples in all states, including North Carolina, it was forced to abandon the showing of a preprinted Washington State grade on its shipping carton. Blue Chelan simply could not afford the extra expense of either maintaining a separate inventory of cartons to be shipped especially to the State of North Carolina or the expense of obliterating the preprinted Washington State grade.

3. Blue Chelan would prefer to ship apples exclusively under the Washington State grades. The Washington State Apple industry has spent approximately sixty years building the identity of its State grade. The Washington State grades have historically enjoyed a premium acceptance and

a quality image because of high standards and mandatory inspection. Conversely, the U. S. grades have not commanded the same respect in the fresh fruit market because of the lack of uniform mandatory inspection in the other 49 states and because they have a lower emphasis of color. Typically, lower quality apples are shipped under the U. S. grades. Blue Chelan believes that it would have an easier time selling its apples and could maintain a more stable price structure if we continue to ship under the Washington State grade. Finally, Washington State Grades are accepted world-wide as an identification synonymous with quality, we do not believe that a single state (there are now other states following North Carolina's lead) has the right to create an economic burden on the showing of the Washington State grades so as to effectively force us to abandon shipping under those grades.

DATED this 26th day of January, 1976.

HAROLD COZART

Harold Cozart

(Jurat omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF
C. W. SCHULKE

(Filed 2 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

* * *

2. In the ordinary process of Washington apples being delivered packed in the fresh market to the various states, they are of course first delivered loose to the various warehouses by the growers. Upon arrival, apples are first treated with various inhibitors to prevent mold and decay and are then placed in cold storage. As the marketing season progresses, this orchard run fruit is removed from cold storage, run over packing lines and graded and packed into bushel containers for subsequent shipment. The packed fruit is then marketed in an orderly manner throughout the entire marketing season, which season usually commences the early or middle part of September and terminates in July or early August of each year. Washington State fruit is held in cold storages pending packing and thereafter pending shipment, approximately one-third of which is controlled atmosphere storage. Controlled atmosphere storage is a special storage in which apples are held in an atmosphere containing not to exceed 5% oxygen. This permits the

apples to be held in a fresh condition for an unlimited period and apples so stored are still fresh and crisp even when removed from storage a year later.

3. Apples are shipped to the various states from Washington either by rail or truck. Shipments destined for North Carolina may either be shipped directly in carload or truckload lots, or part lots, or may arrive by way of trans-shipments from direct shipments to distribution points in one of the neighboring states of North Carolina. Shipments may be made directly to a wholesale distributor or jobber in North Carolina, who in turn resells to individual stores or to the major chain stores, or Washington apples may be in the first instance sold directly to the wholesale produce departments of chain stores or to associated or cooperative groups, which in turn distribute to the individual stores for ultimate sale to the individual consumers.

4. Washington apples are shipped in carton shipping containers, which normally contain one bushel of apples. This container is designed only for shipping purposes in interstate commerce and is not designed for use in the sale of apples to the retail consumer. The retail consumer normally buys apples loose on display trays in the individual stores or put up in consumer sized units of transparent plastic bags of usually three or four pounds, but in some instances ranging up to eight pounds, or in small tray packages with a transparent plastic overwrap, containing normally four to eleven apples, depending upon the size. In the normal course of retail sales to the retail consumer, apples are not sold from the shipping containers and apples are not normally displayed to the retail consumer in the original shipping containers.

5. The state of Washington furnishes approximately one-half of all apples shipped in interstate commerce for fresh consumption in the United States and by February 1 of each year approximately two-thirds of all apples on hand to be sold in the fresh markets of the United States are

apples grown in the state of Washington. The apple industry of the state of Washington ranks fourth agriculturally and makes a major economic contribution to the state. In addition, controlled atmosphere apple cold storages situate in the state of Washington account for nearly one-half of the total controlled atmosphere apple storage in the United States.

C. W. SCHULKE

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

My name is Richard N. Barber. I live in Waynesville, North Carolina. I have personal knowledge of those matters contained herein.

2. I am 69 years of age, and I have been in the business of growing, packing and shipping apples all of my life.

3. It has been my experience that the use of state grades in the marketing of apples creates confusion among all people in the marketing chain: Growers, Processors, Packers, Shippers, Brokers, Receivers, Jobbers, Retailers and Consumers.

4. N. C. General Statute 106-189.1 has been beneficial in reducing such confusion in the marketing of apples in North Carolina.

5. It has been my experience that the apple marketing reports compiled by the U. S. Department of Agriculture often do not designate whether the price quotations are for U. S. grades or state grades. This often causes confusion in the buying of apples because the buyer cannot be certain of the quality of the apples identified only as "Extra Fancy, Fancy", etc.

6. State grades can be used by brokers in such a manner as to harm growers shipping under U. S. grading standards. For example, a broker may say that he can purchase "Fancy" grade apples at $X.00 per bushel. He may be referring to a state grade "Fancy" which is not the same quality as a U. S. Fancy. The result is that the price for the better grade apples, U. S. Fancy, is driven down to be competitive with the state graded "Fancy" apples.

7. Enactment of N. C. General Statute 106-189.1 has forced North Carolina apple growers to improve the quality of apples they sell, since they have to meet U. S. grading standards.

8. I strongly prefer the use of U. S. grades in the grading of apples over the use of State grades.

Dated this 30th day of January, 1976.

RICHARD N. BARBER

Richard N. Barber

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 2 February 1976)

The undersigned, first being duly sworn, says:

1. My name is Charles Murray. I am the Manager of the State Farmers Market, Raleigh, North Carolina.

2. Prior to becoming Manager of the State Farmers Market in Raleigh, I was licensed by the United States Department of Agriculture as an inspector.

3. I have had extensive experience in the area of the inspection of fruit and produce.

4. It has been my experience that the use of state grades in the marketing of apples can cause confusion among buyers and sellers of apples.

5. The exclusive use of the U. S. grade for apples marketed in North Carolina serves to reduce confusion and deception in the marketing of apples.

CHARLES MURRAY

Charles Murray

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT

(Filed 3 February 1976 and 4 February 1976 [Lowe])

(The affidavits of Boyce Enloe, Everett Lutz, and Perry Lowe, Jr. are identical with the exception of the identifying paragraphs as follows):

(1.) My name and address are Mr. Boyce Enloe, Route 1, Box 304-A, Hendersonville North Carolina 28739. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 25 years.

(1.) My name and address are Mr. Everett Lutz, Route 3, Lawndale, North Carolina 28090. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 30 years.

(1.) My name and address are Mr. Perry Lowe, Jr., Route 2, Moravian Falls, North Carolina 28654. I have personal knowledge of the matters contained herein. (2.) I have been involved in the growing, packing, and shipping of apples for over 25 years.

3. It has been my experience that the use of state grades in the marketing of apples has often created confusion among people at all levels of the marketing chain, including brokers and wholesalers.

4. I prefer the use of the U. S. Grade in the grading of apples, and I believe that the exclusive use of the U. S.

Grade for apples marketed in North Carolina serves to reduce confusion and deception in the marketing of apples.

Dated this 31st day of January 1976.

s/ BOYCE ENLOE

Dated this 31st day of January 1976.

s/ EVERETT LUTZ

Dated this 30th day of January, 1976.

s/ PERRY LOWE, JR.

(Jurats omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF
JOSEPH T. BROWNLOW

(Filed 5 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

JOSEPH T. BROWNLOW, being first duly sworn on oath, deposes and says:

1. * * * Prior to the adoption of the North Carolina statute G. S. §106-189.1, the North Carolina Board of

Agriculture had promulgated Regulation No. 324.5(6), reading in part as follows:

> "Apple containers must show the applicable U. S. grades . . . State grades shall not be shown . . ."

The Apple Commission petitioned the North Carolina Board of Agriculture to amend the regulation to permit the showing of Washington State grades. A hearing was held before the Board in North Carolina on March 19, 1973. No ruling on the petition ever was issued by the Board of Agriculture because shortly following the hearing North Carolina General Statute §106-189.1 was introduced and passed by the North Carolina General Assembly, which statute incorporated the foregoing provisions of the Board of Agriculture regulation.

2. At the hearing before the Board of Agriculture, the North Carolina apple industry presented the United States Department of Agriculture "Apple Marketing Report, a Team Study". This report is an apple marketing report consisting of 108 pages discussing matters of supply, quality, marketing efficiency, domestic demand and foreign trade with respect to the apple industry, both fresh and processing, and only in passing makes brief reference to elimination of State grades on closed containers of apples and the showing of U. S. grades only. Following the hearing, because of what I regarded as a very one-sided, biased report introduced at the hearing under the signature of Robert W. Bohall, an employee of the U. S. Department of Agriculture in the Economic Research Service Department, I wrote a letter to Secretary Earl L. Butz, of the United States Department of Agriculture, dated April 17, 1973. Subsequently on May 16, 1973, I received a reply from Clayton Yeutter, Assistant Secretary of the United States Department of Agriculture. Assistant Secretary Yeutter was then in charge of all marketing and consumer services

for the United States Department of Agriculture, and the activities of the Study Report referred to were conducted under his general supervision and as a part of his area of responsibility. Particular attention is called to the following statements in his letter:

> "As was pointed out, the Team reports represented advice to the Secretary and do not represent the official policy of the U. S. Department of Agriculture. It is the feeling of the Department that the matter of grades should be resolved within the apple industry. *Meanwhile, we do not propose to take any action which would lead to the elimination of State grades for apples in those States where the apple industry believes them to be of value.*" (Emphasis supplied.)

The letter concluded with the following statement:

> It would have to be concluded that with *both the Federal and State grades upon the container*, the quality problem would be eliminated. *We certainly appreciate your desire to maintain Washington State apple grades, particularly when they are well established.*" (Emphasis supplied.)

Copies of both letters are attached hereto.

No regulation ever has been adopted or official action taken by the United States Department of Agriculture requiring the showing of only U. S. grades on containers of apples in interstate commerce or the elimination of State grades on such containers.

3. The reason the Washington State grade enjoys such a premium reputation in the market is because of the requirement of its mandatory inspection system at the point of shipment and the consistency and dependability of its grade as a result thereof. No such inspection is required

prior to shipment of apples in interstate commerce from any state in the Union other than the State of Washington under either the U. S. grade or under the State grade of any other state. This mandatory inspection requirement of Washington State apples costs the apple growers of the State of Washington approximately two and one-half cents per box and for the 1975 apple crop of approximately forty million boxes will cost the Washington State apple growers approximately $1,000,000.00. This per box investment is made each year by the Washington State apple growers in order to continue to maintain their grade at its present high level of consistency and dependability. The apple growers of no other state so discipline themselves in order to maintain uniform standards of quality or make this compulsory investment in inspection to insure consistency of high quality in interstate apple trade.

4. Historically, the Washington State grade has always been superior to the U. S. grade in the matter of requirement of a higher intensity of color and uniform interpretation of color requirement. In some other areas, the standards for the Washington State grade and the U. S. grade differ. In an effort to eliminate the North Carolina problem, the apple industry of the State of Washington in 1973 and 1974 held numerous meetings and hearings throughout the industry and, effective September 1, 1974, revised its grade standards to equal or exceed the U. S. grade in every respect, and such standards are now in effect. In my prior affidavit dated September 9, 1975, I set forth correspondence with North Carolina Department of Agriculture Commissioner James A. Graham and my efforts with him to allow the showing of the Washington State grade, because the Washington grade standards had then been revised to equal or exceed U. S. standards.

5. Washington State contains approximately one-half of the controlled atmosphere capacity of the United States. Controlled atmosphere storage of apples is specifically described in the Team Study Report on page 40 and makes specific reference to Washington State, as follows:

> "However, Washington State is the only State that has a fruit condition requirement as part of its Controlled Asmosphere Storage Requirements . . ."

and quotes the Washington law. For this segment of its total volume of apples in interstate commerce, namely approximately one-third, the State of Washington has also been a pioneer and leader in the field. A copy of page 40 of said report is attached hereto and made a part of this affidavit.

JOSEPH T. BROWNLOW

(Jurat and Exhibit 2 omitted in printing)

[Exhibit 1]

DEPARTMENT OF AGRICULTURE

Office of the Secretary
Washington, D. C. 20250

May 16, 1973.

Mr. Joseph T. Brownlow, Manager
Washington Apple Commission
Post Office Box 18
Wenatchee, Washington 98801

Dear Mr. Brownlow:

We appreciate your concern and comments expressed in your letter to Secretary Butz, April 17, 1973, with respect to

the recommendations of the Apple Marketing Study Team. As I indicated in a letter to Mr. Falk, March 2, 1973, Dr. Bohall was appropriately permitted to express the views of the Apple Marketing Study Team as part of the Department's commitment to follow up on all five team reports and to assist the apple industry to coming to grips with its problems. As was pointed out, the team reports represented advice to the Secretary and do not represent the official policy of the U. S. Department of Agriculture. It is the feeling of the Department that the matter of grades should be resolved within the apple industry. Meanwhile we do not propose to take any action which would lead to the elimination of States grades for apples in those States where the apple industry believes them to be of value.

The Apple Marketing Team recommended that "State legislation is needed in 13 States that would eliminate State grades for apples to lessen confusion in trading" after considering the comments of all segments of the apple industry and the economic implications for the total apple industry. The issues as the team saw it were two. One, the confusion in trading that would be caused by a proliferation of State grades; and two, the cost of economic salvage if apples marketed under State grades are of inferior quality and as a result lower consumer confidence in the product. The suggestion to eliminate State grades was mentioned most frequently to the team in Appalachia but similar comments were made in other production regions in the Eastern and Central States and received some support in the Northwest. It is also our understanding that the team did have contact with members of the wholesale and retail trade and this same suggestion was mentioned by members of the apple industry at this level of marketing. It is also our understanding that at the informal meeting with retailers the same suggestion was indeed made.

It is also our understanding that the marketing team interpreted the North Carolina regulation to mean that the

applicable U. S. grade should appear on the container or be marked "unclassified," "not graded," or "grade not determined" but that no recommendation was explicitly made with respect to whether any other grade such as State grade might also appear on the containers.

It would have to be concluded that with both the Federal and State grade upon the container the quality problem would be eliminated. We can certainly appreciate your desire to maintain Washington State apple grades particularly when they are well established.

Thank you for your comments.

Sincerely,

CLAYTON YEUTTER

Clayton Yeutter
Assistant Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

AFFIDAVIT OF LEW STERLING

(Filed 5 February 1976)

LEW STERLING, being first duly sworn on oath, deposes and says:

1. He is and for 12 years has been field representative for the Washington Apple Advertising Commission and represents the interest of the Washington State Apple In-

dustry in the southeastern markets of the United States which include North Carolina markets and Georgia markets.

2. He personally knows and has personal knowledge of the business activities of the following:

A. Boyce Enloe, Hendersonville North Carolina

B. Perry Lowe, Jr., Moravian Falls, North Carolina

C. Everette Lutz, Lawndale, North Carolina

D. Charles Murray, Raleigh, North Carolina

E. Richard N. Barber, Waynesville, North Carolina

3. None of the individuals listed in paragraph 2 buys or receives apples shipped into North Carolina in closed containers.

4. The individuals listed in paragraph 2, with the exception of Charles Murray, are engaged in the growing, packing and shipping of North Carolina apples.

5. Those purchasing apples in closed containers routinely place emphasis on the state as well as federal grades.

6. In the markets which I cover outside of North Carolina, specifically Atlanta, Georgia, the price quotation sheets which are part of the marketing report compiled by the United States Department of Agriculture report in terms of U. S. grades or their equivalent. Also, these reports separately report prices for Washington apples.

7. The market report of the USDA Market News, is currently not published in North Carolina.

LEW STERLING

Lew Sterling

(Jurat omitted in printing)

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

(Title omitted in printing)

SUPPLEMENTAL AFFIDAVIT OF C. W. SCHULKE
CONTROVERTING AFFIDAVITS OF DEFENDANTS

(Filed 5 February 1976)

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

C. W. SCHULKE, being first duly sworn on oath, deposes and says:

* * *

2. Affiant controverts the affidavits of Curtis F. Tarleton and Charles Elks, which are identical, in the following respects:

A. In response to Statement 5, affiant states no confusion is involved in showing the Washington State grade in addition to the U. S. grades on closed containers of Washington apples in North Carolina, since the Washington State grade equals or exceeds the U. S. grade in every respect and wholesale buyers of Washington apples are knowledgeable is this regard. Showing the Washington grade in addition to the U. S. grade simply gives such buyers additional information and advises them that the U. S. grade shown on the container not only meets U. S. standards, but in addition meets the higher Washington State standards.

B. In response to Statement 11, at the time the North Carolina statute was adopted the U. S. grades were not as

a whole superior to the Washington State grade, but said two grades differed in various respects, in some of which the Washington State grade had higher standards and in others of which the U. S. grade had higher standards.

C. In response to Statement 12, the Washington State grade was revised September 1, 1974 to equal or exceed the U. S. grade, that is, in no respect is the Washington State grade inferior to the U. S. grade and in a number of respects it is superior. After this was done, efforts were then made to secure the consent of the North Carolina Department of Agriculture to permit the showing of Washington State grades in addition to the U. S. grades, but this permission was denied.

D. In response to Statement 13, it is true that the Washington State grades may be revised by the Director of Agriculture of the Washington State Department of Agriculture following hearing thereon. Similarly, no legislative action is required to revise the U. S. grades and such U. S. grades are subject to revision following hearing before the U. S. Department of Agriculture. Since 1962, Washington State apple standards have been revised only twice and in both cases to upgrade the standards. In the same period, U. S. standards have been revised three times.

E. In response to Statement 15, affiant has been informed that the North Carolina Department of Agriculture told Colonial Stores it could not advertise Washington State apples under the Washington State grade and prohibited that store from so advertising. If this is the policy of the North Carolina Department of Agriculture, presumably there are other instances of such prohibition.

F. In response to Statement 16, affiant states that the great majority of all shipping containers shipped from the State of Washington are preprinted with the grade and

Statement 16 of said affidavits is incorrect. See also comment on Statement 23.

G. In response to Statement 17, affiant points out that affidavits have been submitted by the Washington State Apple Commission showing that some Washington shippers have refused to ship to North Carolina and some North Carolina buyers have refused to purchase Washington apples because of the burden of obliteration and re-marking with the U. S. grade. Once this obliteration and re-marking has been accomplished, and except for the expense and mutilated appearance and inconvenience in connection therewith, there would then be no reason not to ship Washington apples to North Carolina or for North Carolina buyers not to purchase these apples. The problem arises because of the burden, expense and inconvenience attendant to having them "marked in accordance with the law", to use the language set forth in Statement 17.

H. In response to Statement 18, affiant states that both before and after the enactment of the North Carolina statute, Washington apples have been and now are subject to a mandatory inspection system to insure that the apples meet the grade shown on the shipping container, whether a U. S. grade is shown or the Washington State grade is shown, and therefore Washington apples not meeting the grade standards shown on the shipping container are not shipped to North Carolina or anywhere else. The Washington State mandatory inspection requirement is jointly administered by the Washington State Department of Agriculture and U. S. Department of Agriculture.

I. In response to Statement 19, affiant states there is nothing in the North Carolina statute which has any bearing on the quality of the apples shipped into North Carolina. The statute simply requires that closed shipping containers bear a U. S. grade or are marked "unclassified", "not

graded" or "grade not determined". Thus, apples can be shipped with no grade at all or with the lowest of U. S. grades. If there has been improvement of quality, it can only be because of buyer preference and not because of the North Carolina statute. The U. S. grade, if shown pursuant to the provisions of the North Carolina statute, permits apples of various standards of quality to be shipped in accordance with the various grade specifications, which consist of the following grades:

1. Extra Fancy
2. Fancy
3. U. S. No. 1
4. U. S. No. 1 Early
5. U. S. No. 1 Hail
6. U. S. Utility
7. Combination Extra Fancy and Fancy
8. Combination Fancy and U. S. No. 1
9. Combination U. S. No. 1 and U. S. Utility

If, as permitted by the North Carolina statute, apples are shipped into the state marked "unclassified", "not graded" or "grade not determined", there are no grade standards of quality whatsoever.

J. In response to Statement 20, affiant states that this statement only indicates the importance to North Carolina buyers of Washington apples that the Washington grade be shown and that its showing, in addition to the U. S. grade, should not be prohibited, since it serves a valuable function and better informs the North Carolina buyer.

K. In response to Statement 21, affiant points out that this statement is no justification to discriminate against Washington State apples.

L. In response to Statement 22, affiant states that Washington State ships no apples to the fresh market in

open containers, but all such apples are shipped in closed containers. In shipping in interstate commerce, particularly great distances such as between the State of Washington and the State of North Carolina, apples of high quality such as Washington State apples must be shipped in closed containers to protect them during shipment.

M. In response to Statement 23, affiant states, based on personal checking with container manufacturers, that prior to the enactment of the North Carolina statute approximately 95% to 98% of Washington State apple shipping containers were preprinted with the applicable grade. Because of the burden of the North Carolina statute, a minority but still a significant number of Washington State shippers are being forced to forego the economy of preprinting the grade and are being subjected to the cumbersome, slow, expensive method of hand stamping the grade because it is not known when the shipping container is packed with apples where those apples will be shipped and rather than obliterate the preprinted grade and re-mark a U. S. grade, some shippers are leaving the grade blank in the first instance. Preprinting the grade serves a valuable function in warehousing, because in recent years the Washington State apple industry as a whole has gone to printing the grade in highly legible large size print to enable easy reading of the grade, even when stored in cold storages and stacked in pallets up to 15 or 18 feet off the ground. Hand stamping, on the contrary, is not nearly as legible and is difficult to apply except in relatively small size print and is expensive.

N. In response to Statement 24, affiant states that the count is always hand stamped because until the time of packing a particular shipping container, the size of apples and therefore the number of apples is not known. However, the great majority of the cartons are preprinted with variety and grade, although, as indicated in answer to Statement 16, because of the burden of the North Carolina statute,

increasing numbers of shippers of Washington State apples are having to forego the economy and convenience of preprinting the grade because of the North Carolina requirement that a preprinted Washington State grade must be obliterated and the carton re-marked with the applicable U. S. grade.

O. In response to Statement 25, affiant agrees that a certain amount of apples from Washington State are bagged in plastic bags within the closed shipping container. However, this action is directed only to the marking on the closed shipping container and no objection is made to any North Carolina requirements as to marking the plastic bags which may be within the shipping container.

3. Affiant further controverts the affidavit of Lynwood Davenport, as follows:

A. In answer to Statements 1, 2, 3 and 4, affiant states that the Study Team had no authority to adopt any regulations with respect to marking closed shipping containers of apples, but simply reported the results of its study. Reference is made to letter dated May 16, 1973 from Clayton Yeutter, Assistant Secretary of the United States Department of Agriculture, a copy of which is attached to supplemental affidavit of Joseph T. Brownlow dated January 30, 1976, in which letter the Assistant Secretary states that the U. S. Department of Agriculture does not propose to take any action which would lead to the elimination of state grades for apples in those states where its industry believes them to be of value and concluded that he could appreciate the desire to maintain the Washington State apple grades, particularly when they are well established. The Assistant Secretary further stated that the Study Team interpreted the North Carolina regulation as meaning that the applicable U. S. grade should appear, but made no recommendation that the state grade not also appear on the containers. Assistant Secretary Yeutter concluded that with both the State and Federal grade appearing on the container, the quality problem would be eliminated. Consequently, affiant submits that the findings of the Study Team are of little significance in this action.

B. In answer to Statements 5, 6, and 7, affiant points out that these are simply speculative comments by Mr. Davenport and no action on the part of the United States Department of Agriculture has either been taken or indicated. On the contrary, the letter of Assistant Secretary Yeutter would indicate that the integrity of state grades will be preserved in those states desiring them and that there is no reason why they should not be shown in addition to the U. S. grade in those states where the showing of the U. S. grade is required.

C. W. SCHULKE

C. W. Schulke

(Jurat omitted in printing)

The Memorandum Opinion is printed in the Jurisdictional Statement at Page A-1.

(Please note: In the opinion as printed in the Jurisdictional Statement, the word "not" on page A-9, line 26, should be deleted.)

The Judgment is printed in the Jurisdictional Statement at Page B-1.